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No.

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In the Supreme Court of the United States

October Term, 1982

CINCINNATI CITY SCHOOL DISTRICT
BOARD OF EDUCATION, *et al.*,
Petitioners,

vs.

MARY ANN RONCKER, On Behalf of NEILL RONCKER,
Individually and on Behalf of All Others
Similarly Situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED

Whether the scope of judicial review, within the meaning of the Education For All Handicapped Children Act of 1975 can be expanded beyond the examination of procedural safeguards established pursuant to 20 U.S.C. Section 1412(5)(B), to require a reviewing court to determine whether a child has been provided with all feasible educational services in deciding whether the State's placement of that child is appropriate.

LIST OF PARTIES

PETITIONERS:

Cincinnati City School District Board of Education

James N. Jacobs,

In his official capacity as Superintendent of the Cincinnati City School District,

Robert Braddock

Herbert Brown

Virginia Griffin

Ann Patty

John Rue

David Schiering

Mary Schloss,

In their official capacities as the members of the Cincinnati City School District Board of Education.

RESPONDENTS:

Mary Ann Roncker,

On behalf of Neill Roncker, Individually and on behalf of all others similarly situated.

OTHER PARTIES:[1]

Franklin B. Walter,

In his official capacity as Superintendent of Public Instruction of the State of Ohio,

---

1. These parties were dismissed from the case by the respondent prior to trial in the United States District Court. Dismissal Entry appears in the Appendix.

and

Martha W. Wise
Roy D. McKinley
Martha B. Agler
Wallace E. Blake
Reverend Thaddeus Garrett, Jr.
Richard C. Glowacki
Robert W. Grosser
Virginia E. Jacobs
William M. Judd
Everett L. Jung, M.D.
Thomas A. Kelty
Gerald D. Kisner
Benjamin B. Lavin
Robert A. Lyons, Sr.
John R. Meckstroth
Ward M. Miller
Nancy L. Oliver
Donald S. Ritter
Anthony J. Russo
Ruth S. Schildhouse
Wayne E. Shaffer
Robert W. Walker
Robert E. Williams,

In their official capacities as the members of the Ohio State Board of Education.

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No.

In the Supreme Court of the United States

October Term, 1982

CINCINNATI CITY SCHOOL DISTRICT
BOARD OF EDUCATION, *et al.*,
Petitioners,

vs.

MARY ANN RONCKER, On Behalf of NEILL RONCKER,
Individually and on Behalf of All Others
Similarly Situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The petitioner, Cincinnati City School District Board of Education, *et al.*, respectfully prays that a Writ of Certiorari issue to review the Opinion and Order of the United States Sixth Circuit Court of Appeals entered February 23, 1983, vacating the judgment of the District Court and remanding the case for further proceedings consistent with the Opinion.

OPINIONS BELOW

Opinion of the United States Court of Appeals for the Sixth Circuit.

Judgment Entry of United States Court of Appeals for the Sixth Circuit.

Findings of Fact, Opinion and Conclusions of Law of United States District Court, Southern District of Ohio, Western Division.

Judgment Entry of United States District Court, Southern District of Ohio, Western Division.

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Order Conditionally Certifying Class Action of United States District Court, Southern District of Ohio, Western Division.

These Opinions, Orders and Entries appear in the Appendix.

JURISDICTION

The Court of Appeals for the Sixth Circuit entered judgment vacating the judgment of the District Court for the Southern District of Ohio, Western Division, and remanding it for further proceedings. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The Education For All Handicapped Children Act of 1975, 20 U.S.C. Section 1401, et seq.:

20 U.S.C. Section 1401

20 U.S.C. Section 1412

20 U.S.C. Section 1415

The text of these statutes can be found in the Appendix beginning at page A55.

STATEMENT OF THE CASE

The respondent is the mother of Neill Roncker, who was born on April 13, 1973. Neill is a trainable mentally retarded child with a condition of either "moderate" or "severe" mental retardation.

Neill initially was enrolled in the severe/multi-handicapped class at the Pleasant Ridge Elementary School operated by the Cincinnati Board of Education. The Pleasant Ridge Elementary School is primarily a school for non-handicapped children.

In the spring of 1979, a conference was held to evaluate Neill's Individual Education Plan (IEP) as required by the Education For All Handicapped Children Act of 1975, 20 U.S.C. Section 1401(19). After the evaluation of Neill was completed, his IEP was formulated and he was assigned to a class in a county school operated by the Hamilton County Board of Mental Retardation. The school to which Neill was assigned is exclusively for mentally retarded children and he would have no contact with non-handicapped children during the school day.

Following the completion of Neill's IEP, his parents sought a due process hearing before an impartial hearing officer pursuant to 20 U.S.C. Section 1415(b)(2). The impartial hearing officer directed that Neill be placed in an appropriate special class in a regular elementary school setting.

The Cincinnati Board of Education appealed the decision of the impartial hearing officer to the Ohio State Board of Education pursuant to 20 U.S.C. 1415(c). The appeal was heard by a referee and was adopted by the Ohio State Board of Education. The Ohio State Board of Education directed that Neill be placed in the class for the severely mentally retarded at the county school operated by the Hamilton County Board of Mental Retardation and that some provision be made for Neill to receive some contact with non-handicapped children during the school day.

The respondent filed an action in the United States District Court pursuant to 20 U.S.C. 1415(e)(2), appealing the decision of the Ohio State Board of Education and seeking declaratory and injunctive relief barring the defendants from placing Neill in classes in a school where enrollment and attendance are limited to handicapped children. The State Board of Education and its individual members were dropped from the case by the respondent prior to trial.

The District Court, prior to trial, denied respondent's motion to certify the case as a class action.

This case was tried before United States District Court Judge Carl B. Rubin. Both parties presented expert testimony about Neill and his educational needs. Both parties agreed that Neill required special instruction and that he could not be placed in educational classes with non-handi-

capped children. The parties disagreed as to whether such placement should be in a school where he would have contact with non-handicapped children.

The District Court after trial of the case found that the preponderance of evidence establishes that Neill cannot be appropriately educated in a regular educational environment with the use of supplementary aids and services. The District Court further found that Neill could not be appropriately educated by continuing him in a special class placed in a school of non-handicapped children. The District Court dismissed respondent's Complaint on July 20, 1981.

The respondent filed a Notice of Appeal on August 14, 1981. The United States Sixth Circuit Court of Appeals on February 23, 1983, vacated and remanded the Decision of the District Court for further proceedings consistent with its Opinion.

The United States Sixth Circuit Court of Appeals held that: (1) the District Court utilized the wrong standard of review in deciding the case; and (2) that the District Court should have conducted a hearing before decertifying the case as a class action.

The United States Sixth Circuit Court of Appeals directed the District Court to determine on remand whether those services which made Neill's placement in the class at the Hamilton County Board of Mental Retardation School appropriate for his education could feasibly be provided in a special class which is located in a regular public school. It is from this Order and the Decision of the United States Sixth Circuit Court of Appeals vacating and remanding the Decision of the District Court for further proceedings that this Petition for a Writ of Certiorari is sought.

REASON FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decision of the Supreme Court As to the Proper Interpretation of the Education For All Handicapped Children Act of 1975.

In *Bd. of Ed. of the Hendrick Hudson Central School District v. Rowley*, ... U.S. ....., 102 S. Ct. 3034 (1982), the Supreme Court set forth the parameters of judicial review for suits brought under Section 1415(e)(2) of the Education For All Handicapped Children Act of 1975.

This review is not limited strictly to whether a state has met with the Act's procedural requirements. 102 S. Ct. at 3050. However, Congress did not intend that courts overturn the state's choice of appropriate educational theory, 102 S. Ct. at 3051, or, to resolve questions of educational policy or methodology. 102 S. Ct. at 3052. Rather, a court is to determine whether a state has complied with the procedures set forth in the Act, and, to determine whether the individualized educational program developed through these procedures is reasonably calculated to enable the child to receive educational benefits. 102 S. Ct. at 3051. Under *Rowley* then, a reviewing court is to determine whether a state has established procedural safeguards pursuant to Section 1412(5)(B), which assure that "to the maximum extent appropriate," handicapped children are educated with non-handicapped children.

The Court of Appeals expands the holding of *Rowley* by requiring a court to go beyond the question of procedural safeguards and whether a child's placement is appropriate and determine whether the state has provided all "feasible" services in a child's individualized educational program. This type of inquiry reaches beyond the limita-

tion of Section 1412(5)(B), expands judicial review beyond the standard outlined in *Rowley*, and involves the courts in the questions of educational policy which Congress intended to leave to the states.

CONCLUSION

The Decision of the Court of Appeals conflicts with the Decision of the Supreme Court in *Bd. of Ed. v. Rowley*. For this reason, a Writ of Certiorari should issue to review the Judgment and Opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed February 23, 1983)

No. 81-3494

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARY ANN RONCKER on Behalf of NEILL RONCKER, Individually and on Behalf of All Others Similarly Situated,
Plaintiff-Appellant,

v.

FRANKLIN B. WALTER, *et al.*,
Defendants-Appellees.

ON APPEAL From the United States District Court For the Southern District of Ohio.

Before: KENNEDY and CONTIE, *Circuit Judges;* and GORDON, *Senior District Judge.**

CONTIE, *Circuit Judge,* delivered the opinion of the Court in which GORDON, *Senior District Judge,* joined. KENNEDY, *Circuit Judge,* (pp. 11-17) filed a separate dissenting opinion.

CONTIE, *Circuit Judge.* In this appeal, the plaintiff challenges the placement of her retarded son under the

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*The Honorable James F. Gordon, Senior Judge, United States District Court for the Western District of Kentucky, sitting by designation.

Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.* (the Act).[1] As a condition for receiving federal aid, the Act provides that a free appropriate education must be provided to all children. 20 U.S.C. § 1412. It further requires states to establish "procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(B).[2]

The Supreme Court recently decided what "free appropriate education" means in the context of the Act. *Bd. of Ed. of the Hendrick Hudson Central School District v. Rowley,* ..... U.S. ....., 102 S.Ct. 3034 (1982). In this case, we examine the Act's requirement that handicapped children be educated with non-handicapped children to the "maximum extent appropriate."

I

The plaintiff's son, Neill Roncker, is nine years old and is severely mentally retarded. He is classified as Trainable Mentally Retarded (TMR), a category of chil-

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1. For extensive discussions as to the legislative history and background of the Act, *see Bd. of Education of the Hendrick Hudson Central School District v. Rowley,* ..... U.S. ....., 102 S.Ct. 3034 (1982); *Note, Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975,* 92 HARV. L. REV. 1103 (1979).

2. The concept that handicapped children should be educated along with non-handicapped children is popularly known as "mainstreaming."

dren with an IQ of below 50. Less severely retarded students are classified as Educable Mentally Retarded (EMR) and are generally educated in special classes within the regular public schools.

There is no dispute that Neill is severely retarded and has a mental age of two to three with regard to most functions. Neill also suffers from seizures but they are not convulsive and he takes medication to control them. No evidence indicates that Neill is dangerous to others but he does require almost constant supervision because of his inability to recognize dangerous situations.

In 1976, Neill was evaluated and recommended for the Arlitt Child Development Center. It was believed that he would benefit from contact with non-handicapped children. In the spring of 1979, a conference was held to evaluate Neill's Individual Education Plan (IEP) as required by the Act.[3] Present at the conference were Neill's parents, school psychologists, and a member of the Hamilton County Board of Mental Retardation. After evaluating Neill, the school district decided to place him in a county school. Since these county schools were exclusively for mentally

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3. 20 U.S.C. § 1401 (19) provides:

The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

retarded children, Neill would have received no contact with non-handicapped children.

The county schools receive part of their funding through tuition for individual students, which is paid by the school district. The county schools also receive partial funding through the state by virtue of a mental retardation tax levy. Funds from this levy are not available to public schools.

The Ronckers refused to accept the placement and sought a due process hearing before an impartial hearing officer pursuant to the Act. 20 U.S.C. § 1415(b)(2). The hearing officer found that the school district had not satisfied its burden of proving that its proposed placement afforded the maximum appropriate contact with non-handicapped children. He ordered that Neill "be placed within the appropriate special education class in the regular elementary school setting."

The school district appealed to the Ohio State Board of Education pursuant to 29 U.S.C. § 1415(c). The State Board found that Neill required the educational opportunities provided by the county school. It also found, however, that he needed interaction with non-handicapped children during lunch, recess and transportation to and from school. Accordingly, the State Board held that Neill should be placed in a county school so long as some provision was made for him to receive contact with non-handicapped children. The State Board did not indicate how this split program was to be administered.

While the dispute over placement continued, Neill began attending a class for the severely mentally retarded at Pleasant Ridge Elementary School in September 1979. Pleasant Ridge is a regular public school which serves both handicapped and non-handicapped children. Neill's contact with non-handicapped children at Pleasant Ridge is lim-

ited to lunch, gym and recess. Neill has remained at Pleasant Ridge during the pendency of this action.

In January 1980, Neill's mother filed this action against the state and the school district. The claims against the state were settled. Prior to trial, the district court denied class certification without a hearing.

At trial, both parties presented expert testimony. Both agreed that Neill required special instruction; he could not be placed in educational classes with non-handicapped children. The plaintiff, however, contended that Neill could be provided the special instruction he needed in a setting where he could have contact with non-handicapped children. The school district contended that Neill could not benefit significantly from mainstreaming and that any minimal benefits would be greatly outweighed by the educational benefits of the county school.

The district court found in favor of the school district. The court interpreted the Act's mainstreaming requirement as allowing school districts broad discretion in the placement of handicapped children. In this case, the district court found that the school district did not abuse its discretion in placing Neill Roncker in a school where he would receive no contact with non-handicapped children. This conclusion was supported by the district court's finding that Neill had made no significant progress after 18 months at Pleasant Ridge. Finally, the district court held that a class action was inappropriate because the educational placement of handicapped children requires individual determinations.

II

We find that the district court erred in reviewing the school district's placement decision under an "abuse of discretion" standard.

The Act provides that a district court "shall receive the records of the [state] administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). The school district contends that this provision only gives courts the limited authority to determine if the district has complied with the procedural requirements of the Act. The plaintiff, on the other hand, contends that the Act requires a *de novo* review not limited to the Act's procedural requirements.

This exact dispute over standard of review was presented and decided in *Rowley*, 102 S.Ct. 3034. The Supreme Court rejected the notion that courts were strictly limited to reviewing for procedural compliance with the Act. *Id.* at 3050-51. However, the Court also rejected the argument that the Act gave the courts broad power to review and upset placement decisions, stating that "the provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Id.* at 3051. The court concluded that the proper balance is to give greater deference to the state's placement decision if the procedural requirements of the Act are met. In this way, the court's encroachment on the basically legislative decisions involving the distribution of educational resources is kept to a minimum.[4]

The first inquiry in the two-step test mandated by *Rowley* is whether the state has complied with the Act's procedural requirements. These requirements clearly have

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4. States which desired even less federal intrusion could simply decline to participate in the program. It should also be noted that challenges to administrative decisions may be filed in either state or federal court.

been satisfied in this case. The second inquiry is whether "the individualized educational program developed through the Act's procedures [is] reasonably calculated to enable the child to receive educational benefits?" *Id.* at 3051.

In *Rowley,* the Supreme Court found that the state had complied with the Act's procedural requirements and had developed an IEP reasonably calculated to lead to educational benefits. Accordingly, the Act was satisfied. The present case differs from *Rowley* in two significant ways.

First, this case involves the mainstreaming provision of the Act while *Rowley* involved a choice between two methods of educating a deaf student. In the latter case, the dispute is simply one of methodology and the Supreme Court has emphatically stated that such questions should be left to the states. *Id.* at 3051-52. In the present case, the question is not one of methodology but rather involves a determination of whether the school district has satisfied the Act's requirement that handicapped children be educated alongside non-handicapped children to the maximum extent appropriate. The states accept federal aid in return for compliance with the Act. Since Congress has decided that mainstreaming is appropriate, the states must accept that decision if they desire federal funds.

Second, in this case, the district court failed to give "due weight" to the state administrative proceedings. *Rowley,* 102 S.Ct. at 3051. Both the impartial hearing officer and the State Board of Education found that the school district's placement did not satisfy the Act's mainstreaming requirement. Under such circumstances, the district court erred in reviewing the school district's placement under the deferential abuse of discretion standard. Such a standard of review renders the administrative hearings provided for by the Act virtually meaningless. By way of

contrast, in *Rowley,* the administrative hearings unanimously concurred with the original placement but the district court found the placement to be inappropriate.

In sum, the abuse of discretion standard of review utilized by the district court was improper under the Act. We further find that the standard of review as set out in *Rowley* requires a *de novo* review but that the district court should give due weight to the state administrative proceedings in reaching its decision.

III

Since the district court employed an improper standard of review, we remand this case in order to allow the district court to re-examine the mainstreaming issue in light of the proper standard of review.[5]

The Act does not require mainstreaming in every case but its requirement that mainstreaming be provided to the *maximum* extent appropriate indicates a very strong congressional preference.[6] The proper inquiry is whether a proposed placement is appropriate under the Act. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagree-

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5. Unlike the dissent, we are unwilling to accept the district court's findings of fact as being totally independent from its conclusions of law. Having found that the District Court erred in its conclusions of law, we believe that remanding the case is preferable to attempting to apply the proper legal standard to factual findings which were made under an overly deferential standard of review.

6. The Act's mainstreaming requirement applies to nonacademic activities such as lunch, gym, recess and transportation to and from school. *See* 34 C.F.R. § 300.553.

ment is not, of course, any basis for not following the Act's mandate. *Campbell v. Talladega City Bd. of Education,* 518 F.Supp. 47, 55 (N.D. Ala. 1981). In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting. Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children. *See Age v. Bullit County Schools,* 673 F.2d 141, 145 (6th Cir. 1982). Cost is no defense, however, if the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children. The provision of such alternative placements benefits all handicapped children.

In the present case, the district court must determine whether Neill's educational, physical or emotional needs require some service which could not feasibly be provided in a class for handicapped children within a regular school or in the type of split program advocated by the State Board of Education. Although Neill's progress, or lack thereof, at Pleasant Ridge is a relevant factor in determining the maximum appropriate extent to which he can be mainstreamed, it is not dispositive since the district

court must determine whether Neill could have been provided with additional services, such as those provided at the county schools, which would have improved his performance at Pleasant Ridge.

We recognize that the mainstreaming issue imposes a difficult burden on the district court. Since Congress has chosen to impose that burden, however, the courts must do their best to fulfill their duty. The district courts are not without guidance inasmuch as they have the benefit of two state administrative proceedings and may justifiably give due weight to those administrative findings.

IV

The final issue before us is whether the district court erred in refusing to allow this case to proceed as a class action. Following oral arguments to the district court, a class was certified. That certification was conditional and, prior to trial, the district court denied the motion for class certification without a hearing. We believe that the district court erred and should, on remand, hold a hearing to determine if class relief is appropriate.

We find no bar to class actions in the Act. Several courts have certified class actions where the requirements of Rule 23 of the Federal Rules of Civil Procedure were met. *See, e.g., Battle v. Commonwealth of Pa.,* 629 F.2d 269 (3d Cir. 1980), *cert. denied,* 452 U.S. 968 (1981); *Garrity v. Gallen,* 522 F.Supp. 965 (D.N.H. 1981); *Green v. Johnson,* 513 F.Supp. 965 (D.Mass. 1981). That the Act requires individual placement decisions does not of itself bar all class actions. *See Califano v. Yamasaki,* 442 U.S. 682, 698-701 (1979) (finding no bar to class actions under the Social Security Act despite that Act's provision that actions may be brought by "any individual." 42 U.S.C. § 405(g)).

Although we agree with the district court's statement that the Act requires individual determinations as to placement, one of the plaintiff's claims is that the school district automatically sends students classified as Trainable Mentally Retarded to the county schools. Such an allegation, if proven, would show a violation of the Act for the very reason that placements were not individually made. Furthermore, if children are labeled as TMR solely on the basis of IQ scores, the placements would violate § 1412(c)(5) which provides in part that "no single procedure shall be the sole criteria for determining an appropriate educational program for a child." The plaintiff should be given an opportunity to argue that there is sufficient evidence to justify class certification, at least as to certain issues.

The judgment of the district court is VACATED and the case is REMANDED for further proceedings consistent with this opinion.

KENNEDY, *Circuit Judge,* dissenting. The District Court has already done in part what the panel asks it to do on remand. As required by *Rowley,* it found that the educational program in which Neill Roncker was to be placed was reasonably calculated to enable him to receive educational benefits. The District Court also found that Neill could not be appropriately educated by continuing him in the self-contained class of handicapped children which he was attending in the regular elementary school.

In making these findings the District Court clearly recognized that placement with non-handicapped children should be a most important objective.

> The recipient of the federal funding, in this case the state and local Boards of Education, is required to provide an education for the handicapped individual and to "insure that handicapped persons participate with non-handicapped persons in such activities and services

> to the maximum extent appropriate to the needs of the handicapped person in question."

District Court Op. at 7.

The whole record of the District Court is devoted to the question of whether Neill Roncker's needs can be met in the self-contained handicapped classroom in the elementary school he has been attending or whether he needs to be taught with other children closer to his chronological age and learning level with the support services that can presently only be provided in the 169 program at a separate school. Appellant argues that the finding that Neill could not benefit from continued placement in his present classroom is clearly erroneous. The panel's opinion does not so find and I would not so find. These findings of fact are independent of the District Court's legal conclusions. Neill Roncker was not progressing in his present placement but was regressing. His ability to interact with the non-handicapped children was at best minimal. His opportunity to interact with non-handicapped children there was also very minimal. Yet, despite these findings, the panel's decision requires the District Court to determine on remand whether it would be "feasible" to provide an equivalent of what is now provided in the 169 schools in classrooms located in regular elementary schools. The District Court has admittedly not made such a finding. I do not believe, however, that such an inquiry is authorized by section 1412(5) or the "mainstreaming" concept it embodies.

Section 1412(5) requires that participating states establish,

> (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped,

> and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that the education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . .

In this language Congress has expressed a clear preference for educating handicapped children in the regular classrooms of the public schools. Handicapped children should be removed from regular classes only when their education cannot be achieved satisfactorily with the use of supplementary aids and services. Despite this preference for "mainstreaming," however, the statute clearly contemplates that there will be some separate schools and schooling. *Rowley,* ..... U.S. ....., 102 S.Ct. 3034, 3038, n.4 (1982). Section 1412(5) does not require that classrooms for the severely mentally retarded, such as Neill Roncker, whose only interaction with non-handicapped children is to observe them, be located in the regular elementary school. Rather, this section is directed to the handicapped child who can spend some time in the regular classroom if given special aids or assistance.[1]

Other than cost, the District Court in the present case has fully considered whether Neill Roncker could be educated in a self-contained handicapped classroom in a regular school. The severity of Neill's handicap is such that even with supplementary aids and services, the District Court found that Neill cannot achieve a satisfactory education or indeed any education in a regular class.

The appellants have nevertheless argued that if Neill must be educated in a 169 program, that program must be provided within the "regular school environment" even if

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1. It is not necessary to decide whether the child who can attend a regular gym, or music class, falls within the statute's mainstreaming requirement.

the only benefit from such placement is to avoid the stigma of attending a special school. Because the 169 program requires children of chronological age with roughly the same developmental ability to be placed together, a classroom for each age could not be located at each regular school. However, the classrooms for one age could be at one school and those for another at a different school. The children could probably be bussed to assemblies. Special gym teachers, physical and occupational therapists and special remedial teachers could go from school to school. Appellant argues that this is required unless the children could learn "zero" in such environment.

The appellant's arguments essentially represent one of two competing educational theories presented by this case. The first is that a program with all of the components of the 169 program can only be fully implemented in a separate school. This program alone, it is argued, is appropriate for severely handicapped children such as Neill Roncker who cannot benefit from *any* regular classroom experience. The second theory is that all handicapped children (except those who can be in the regular classroom) must be placed in special classrooms located in regular elementary schools, unless a child would get zero benefit from a classroom so situated.

Rowley held that Congress did not intend the courts to overturn a state's educational policy once the statutory requirements have been met.

> We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." *San Antonio School District v. Rodriguez,* 411 U.S. 1, 42 (1973). We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the

> Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

Rowley, ... U.S. at ....., 102 S.Ct. at 3052. When Congress imposes a requirement in legislation enacted pursuant to the spending power, it must do so unambiguously. *Rowley* ..... U.S. ....., 102 S.Ct. at 3049-3050 n. 26; *Pennhurst State School v. Halderman,* 451 U.S. 1, 17 (1981). Section 1412(5), far from unambiguously requiring that school districts place severely handicapped children in the regular school environment even if they cannot be satisfactorily educated in that environment, requires only that handicapped children be "mainstreamed" to the maximum extent *appropriate.* For those more severely retarded children, such as Neill Roncker, who are unable to be satisfactorily educated in any respect in a regular classroom, the statute does not prohibit the school district from making the judgment as to where their classroom should be located.[2]

I do not read the panel's decision as adopting the appellant's zero benefit position. For example, to the extent that the panel directs the District Court to consider costs it reserves some discretion to that court. Presumably, the District Court is permitted to decide whether one program is excessively expensive in comparison to another. Further, depending upon which definition of the word "feasible" the panel intends, *i.e.,* (1) capable of being done; (2) capable of being dealt with successfully, suitable; or,

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2. This does not mean that the District Court does not review a placement to determine whether a child is receiving an appropriate education as defined in 20 U.S.C. § 1401(18).

(3) reasonable,[3] the District Court may have yet more discretion. If the District Court may make these discretionary decisions in determining whether a placement is appropriate, I see no grounds on which the school district should be denied such discretion insofar as placement of handicapped children who cannot benefit from any regular classes are concerned.

Finally, I am unable to agree that the District Court failed to give "due weight" to the state administrative proceedings. The disposition by the District Court was based upon Neill Roncker's progress and lack of progress in a special classroom. The administrative hearing officers did not have this actual information concerning Neill's progress but could only anticipate what his progress might be.[4]

Further, the two administrative decisions cannot themselves be fully reconciled. The impartial hearing officer, in making the initial decision of August 1979, appears to have been uncertain whether Neill would be able to handle assignment to a regular first grade class, something it is now clear he could not do.

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3. *Webster's New International Dictionary* (2d Ed. 1961): 1. Capable of being done, executed, or effected; possible of realization. 2. Capable of being managed, utilized or dealt with successfully; suitable. 3. Likely; probable; reasonable.

Random House College Dictionary (1st Ed. 1975): 1. capable of being done or accomplished. 2. suitable. 3. probable; likely.

It is difficult in the context of this case to determine exactly which definition of "feasible" the panel intends. Since other school districts locate all handicapped classrooms in regular schools and Cincinnati previously did so, the record would require a finding that it is capable of being done. Therefore, I do not believe the panel intends this definition of feasible. In addition, the record discloses that these classes for the severely mentally retarded which had previously been dispersed among regular schools were not effective. Thus, the second definition of feasible seems equally inappropriate to remand in this case.

4. Since this case is to be remanded, it will be important that the District Court have current information with respect to Neill's present development and abilities before making a final disposition.

> There is doubt in the mind of the impartial hearing officer as to Neill's ability to attend the regular first grade setting, however, I don't believe that the complete answer is available to this question until he is assigned to the first grade and the attempt is made.

Hearing Officer's Op., App. at 195.

The hearing officer nonetheless directed that Neill be placed in the special education class in the regular school setting.

On appeal by the school district, the state board of education referee found that Cincinnati did not have to duplicate the 169 program in a regular elementary school as the hearing officer had mandated. She found, "Cincinnati has shown that the nature and severity of Neill's handicap warrants his removal from the regular educational environment . . . ." App. 210. She also found that placement in the 169 program at Dyer School was appropriate as long as Neill was provided an opportunity to interact with non-handicapped peers in a regular school setting in appropriate activities such as lunch, gym and transportation. How this was to be accomplished was not described, but it is suggested that an aide would transport him to the regular school for lunch and recess and perhaps some time in the future, art and music.

Neither appellant nor appellees are satisfied with this split attendance solution. "[C]ounsel for both the Ronckers and the school district expressed their opposition to the referee's proposed split attendance scheme as being inappropriate for Neil [sic] . . . ." App. 15. More importantly, although a number of experts testified, no witness endorsed split placement. Under these circumstances, where no expert witness approved or endorsed split placement, I do not believe we should suggest it as an appropriate placement.

I would affirm the judgment of the District Court that Neill Roncker's placement satisfies the requirements of section 1412(5).

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT

(Filed July 20, 1981)

No. C-1-80-29

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARY ANN RONCKER, *et al.*,
Plaintiffs,

v.

FRANKLIN WALTERS, *et al.*,
Defendants.

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

This matter is before the Court following trial and presentation of evidence. Plaintiffs seek declaratory and injunctive relief barring defendants, The Cincinnati City School District Board of Education, from placing plaintiff Neill Roncker, a mentally retarded child, in classes operated by the Hamilton County Board of Mental Retardation, which are limited to handicapped children. The plaintiffs also seek an order requiring the formation of a class for "trainable mentally retarded" children in the Cincinnati Public Schools as an alternative to placement in the Hamilton County program. In accordance with Rule 52 of the Federal Rules of Civil Procedure, the Court does submit herewith, its Findings of Fact, Opinion and Conclusions of Law.

I.

FINDINGS OF FACT

1. Neill Roncker was born on April 13, 1973. At the time of trial in March of 1981, he was a month short of his eighth birthday. Neill Roncker has an intelligent quotient (I.Q.) between 30 and 50. "Normal" I.Q. is considered to be approximately 100. An I.Q. of 50 is used to separate two categories of handicapped children. Those above are generally termed "educable mentally retarded" (EMR), those below are termed "trainable mentally retarded" (TMR).

In the field of education, there appear to be terms that are further descriptive of degree of mental retardation. Children are classified as "mild", "moderate", "severe" or "profoundly" retarded. While different descriptive terms have been used, it is agreed by all parties that Neill Roncker is a trainable mentally retarded child with a condition of either "moderate" or "severe" mental retardation. His mental age is in the two- to three-year range.

2. Neill Roncker was enrolled at the Arlitt Child Development Center, operated by the University of Cincinnati, in Sept. 1976. He received training there until June, 1979. In September of 1979, he was enrolled in the severe/multi-handicapped class at the Pleasant Ridge Elementary School operated by the Board of Education and has remained there ever since.

The class at the Pleasant Ridge School is composed of seven children, all of whom are handicapped, and supervised by a specially trained teacher with two assistants. Pleasant Ridge Elementary School is within the Cincinnati school district. It is primarily a school for non-handicapped children. The children in the handicapped class

as well as all others use the same lunchroom, although they sit at separate tables; the same gymnasium, although in separate groups, and the same playground. Other than peripheral contacts in these three areas, there is neither connection with nor interaction between the non-handicapped children and those in the handicapped class.

3. The Hamilton County Board of Mental Retardation is an entity that exists separate and apart from the Board of Education of the Cincinnati School District. It was created by Ohio Rev. Code 3323.09. Its schools and its classes are limited to mentally retarded children and, other than some contact with older, non-handicapped children who volunteer to participate in an instruction program for handicapped children, there is no contact with non-handicapped children. It maintains three separate schools within Hamilton County to serve the several boards of education therein.

4. In July of 1979, a hearing was held to determine the appropriate educational placement for Neill Roncker. This hearing was held in accordance with 20 U.S.C. §1415 (b)(2). The Impartial Hearing Officer issued his decision in August of 1979 and directed that the plaintiff be placed "within the appropriate special class in the regular elementary school setting." This decision was appealed to the Ohio State Board of Education. That body appointed a referee to review the proceedings and decisions and to make a recommendation.

In October of 1979, an additional hearing was held by such referee. On October 23, 1979, she issued her report and recommended that the Ohio State Board of Education reverse the determination of the Impartial Hearing Officer. On November 12, 1979, the referee's recommendation was adopted by the State Board of Education. Appeal to the

United States District Court from such determination was filed January 18, 1980.[1]

5. Neill Roncker has been examined and evaluated with the following conclusions:

(A.) On March 19, 1979, he was given an educational reevaluation by the Cincinnati Center for Developmental Disorders (Def. Ex. L). At that time, the evaluator determined that his gross motor functioning was at the three-year level, his fine motor functioning at the 24- to 29-month range and his language and cognition at the two-year level. The evaluator also noted that his progress since June of 1976 was minimal.

(B.) The Psychological Services of the Cincinnati Public Schools on January 13, 1981 (Def. Ex. H) determined that his mental age was two years, one month and his I.Q. below 30.

(C.) On February 12, 1981, an educational evaluation was made at the Children's Diagnostic Center. The evaluator determined that his performance in the area of gross motor functioning was at the three-year level, his fine motor and cognitive functioning were in the two- to two and one half-year range and the receptive language and expressive language were like that of a two year old. The evaluator specifically noted "of specific concern is the apparent drop in functioning". (Def. Ex. I).

(D.) A psychological evaluation was made on February 19, 1981 at the Children's Diagnostic Center (Def.

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1. The original cause of action was filed against the members of the Ohio State Board of Education and the superintendant of public instruction of the State of Ohio. Prior to trial, a settlement was reached with such defendants and they were dismissed from this action. By agreement of the parties, Neill Roncker was enrolled in the special class at Pleasant Ridge Elementary School during the pendancy of this action.

Ex. J). The psychological evaluation determined that his mental age was two years, five months and indicated that, in relation to his chronological age of seven years, 10 months, his I.Q. was approximately 30.

A comparison of the evaluations of January 19, 1979 and those of February, 1981, indicate little, if any, progress in the plaintiff's development, although he had, in the two intervening years, spent 18 months as a member of a class of handicapped children in a public school composed primarily of non-handicapped children.

II.

OPINION

There are few questions more troubling in its human implication than the plight of a retarded child. Society has progressed from the days in the not so distant past when it was an accepted practice to place such children in institutions for the balance of their lives and pretend that they no longer existed. Recent developments in the law have resulted in recognition of legal rights of the handicapped. They have at least been removed from the category of "non-persons".

The issue presented here, however, appears to be less in the discipline of law and more in the fields of neurology, child psychology and education. The Court had the benefit of expert opinions. They were in all instances detailed and comprehensive. They were also essentially contradictory. There are, it appears, differing schools of thought sincerely subscribed to by outstanding individuals regarding the treatment of a retarded child. Indeed, one expert, Dr. William Bricker, who testified before the Court, sought primarily to reconcile the differing viewpoints, but apparently, to this point, without great success.

A court of law is equipped only to determine legal rights established by statutes, precedents and rules of evidence. Within these limitations, a fair and just society may be fashioned. A perfect society, however, will not.

The duty enjoined upon this Court is set forth in 20 U.S.C. §1415(e)(2). The Court "shall [1] receive the records of the administrative proceedings . . . [2] hear additional evidence at the request of a party and [3] bas[e] its decision on the preponderance of the evidence.

Implicit in the foregoing are the following: Public officials are deemed to act in good faith and within the limits of their appropriate authority. Absent a showing to the contrary, no presumption of either an abuse of discretion or bad faith may attend any decisions of such public officials. No evidence of bad faith or abuse of discretion was present in this case.

Although the plaintiffs have made claims pursuant to 29 U.S.C. §794, 42 U.S.C. §1983, and the 14th Amendment, the provisions of The Education for All Handicapped Children Act, 20 U.S.C. §1401 *et seq.* (The Act), are controlling.

A brief review of the federal statutory scheme in this area will aid in an understanding of the posture of this case. The Education for All Handicapped Children Act, 20 U.S.C. §§1401-1420 (1976), represents an attempt by Congress to assist the states in meeting the burdens imposed upon them by the widespread judicial recognition of "the right of handicapped children to a free public education appropriate to their needs." (Footnote omitted). *Battle v. Commonwealth of Pennsylvania,* 629 F.2d 269, 272 (3rd Cir. 1980). The Act is based upon the principle that all handicapped children are entitled to a free public education that is appropriate to their needs and that meets the same standards as the education offered to non-handicapped chil-

dren. Each state seeking to participate and to receive federal funding must develop guidelines and follow the procedures set forth in 20 U.S.C. §1401, *et seq.*

One of the statutory mandates requires the formation of an individualized educational program (I.E.P.) for each handicapped child. 20 U.S.C. §1412(4). The I.E.P. must set forth the child's present level of education, both the long-term and short-term educational goals developed for that child, the educational services to be provided for that child, and a structure for evaluating the child's progress towards those goals, 20 U.S.C. §1401(19). The local educational agency must review the I.E.P. "periodically but not less than annually." 20 U.S.C. §1414(a)(5). The child's parents must be given the opportunity to review the I.E.P., provide input into the placement process, and to obtain an independent educational evaluation of their child if they do not agree with the placement suggested by the local agency. 20 U.S.C. §1415(b)(1)(A).

The Ronckers disputed the suggested placement of their son with the Hamilton County Board of Mental Retardation. Prior to the filing of this case, they exhausted all of the administrative remedies provided by the statute. Consequently, the jurisdictional prerequisite to the filing of an action in this Court, exhaustion of the administrative remedies, has been met. *Scruggs v. Campbell,* 630 F.2d 237 (4th Cir. 1980), *Doe v. Anrig,* 500 F.Supp. 802 (D. Mass. 1980).

The question before the Court is an extremely narrow one. As stipulated, the plaintiffs raise no claims with respect to procedural violations at any of the prior administrative proceedings. (Doc. No. 21). The thrust of the plaintiffs' claims focuses upon the requirement that the State establish "procedures to assure that, *to the maximum*

extent appropriate, handicapped children, . . . are educated with children who are not handicapped, . . .". 20 U.S.C. §1412(5)(B) (emphasis added). Apparently, the Court must define "to the maximum extent appropriate" as applied to the case of Neill Roncker.

The recipient of the federal funding, in this case the state and local Boards of Educations, is required to provide an education for the handicapped individual and to "insure that handicapped persons participate with non-handicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question." 34 C.F.R. §104.34(b). Appendix A to that section of the Code of Federal Regulations offers some guidance to determining the proper definition of "appropriateness" in the context of the education for the handicapped statutes. Educational services for the handicapped must be designed to meet the handicapped child's individual educational needs to the same extent that those of non-handicapped children are met. The comments suggest a preference for integrating handicapped students with non-handicapped students wherever possible. However, those comments also recognize that there may be instances in which separate facilities are necessary and, by example, point to facilities for severely retarded persons.

It is clear that the phrase "to the maximum extent appropriate" does not impose an absolute obligation. The statute does not impose a mandatory duty to educate handicapped children in an integrated environment with non-handicapped children. A statute imposing such a duty could easily have been fashioned by Congress.

The options before this Court for Neill Roncker's placement are three-fold. (1) The child's continuation in his

present class at Pleasant Ridge Elementary;[2] (2) the child's placement in the 169 program operated by the Hamilton County Board of Mental Retardation; or (3) the child's placement in a class for trainable mentally retarded children in the public school system.

Whatever else may be in dispute in this case, it appears that Neill Roncker made little, if any, identifiable progress from March of 1979 to February of 1981 although enrolled in a class of handicapped children in a public school composed primarily of non-handicapped children. (Finding of Fact No. 5).

The preponderance of evidence presented to the Court both in oral testimony and in the records of the administrative proceedings establishes that this child cannot be appropriately educated in a regular educational environment, with the use of supplementary aids and services.

The preponderance of evidence does not establish that the child may be appropriately educated by continuing him in a class of handicapped children placed in a school of non-handicapped children.

III.

CONCLUSIONS OF LAW

A. This Court has jurisdiction in accordance with 20 U.S.C. §1415(e)(2).

B. The use of the phrase "maximum extent appropriate" does not impose an absolute duty but rather grants discretion to determine the placement of handicapped children.

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2. Neither this option nor the child's placement in a regular public school class with non-handicapped children has been urged by either side.

C. Where a Board of Education has made a full assessment of appropriate placement of a handicapped child, that determination, in the absence of an abuse of discretion, will not be set aside.

D. It is not an abuse of discretion to discontinue the placement of a child in a class of handicapped children in a regular public school where such placement after 18 months has resulted in no significant progress.

E. The appropriate educational placement of handicapped children is an individual determination and is not a matter to be determined in a class action.

F. In view of the foregoing conclusions of law, the complaint of plaintiff should be and it is hereby DENIED. Each party to pay its own costs.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
Chief Judge
United States District Court

JUDGMENT OF THE UNITED STATES DISTRICT COURT

(Filed July 20, 1981)

Civil Action File No. C-1-80-29

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

MARY ANN RONCKER, *et al.*,
Plaintiffs,

vs.

FRANKLIN WALTER, *et al.*,
Defendants.

JUDGMENT

This action came on for trial before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiffs take nothing, that the action herein is hereby DISMISSED; Each party to pay its own costs.

JOHN D. LYTER
Clerk of Court
/s/ By: REBECCA E. ANDERSON
Deputy

DISMISSAL ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed May 6, 1981)

Case No. C-1-80-029

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARY ANN RONCKER
On behalf of Neill Roncker,
Plaintiff,

vs.

FRANKLIN B. WALTER, *et al.*,
Defendants.

DISMISSAL ENTRY

This cause of action, under the terms of the Settlement Agreement attached hereto and incorporated herein is hereby settled and dismissed with prejudice as to the State Defendants, parties to share costs.

/s/ CARL B. RUBIN
United States District Court
Judge

SETTLEMENT AGREEMENT

This Agreement is made and entered into this 23rd day of April, 1981, by and between MARY ANN RONCKER on behalf of NEILL RONCKER, Plaintiff in the case of

Roncker v. Walter et al., United States District Court, Southern District of Ohio, Eastern Division, Case No. C-1-80-029, and the following State Defendants in said litigation, MARTHA B. AGLER, WALLACE E. BLAKE, GRACE T. CHRISTY, TIMOTHY M. FLANAGAN, RICHARD C. GLOWACKI, JOHN E. HOLCOMB, VIRGINIA E. JACOBS, EVERETT L. JUNG, M.D., THOMAS A. KELTY, GERALD D. KISNER, MARY R. LINDNER, ROY MCKINLEY, JOHN R. MECKSTROTH, NANCY L. OLIVER, PAUL F. PFEIFFER, DONALD S. RITTER, CHESTER A. ROUSH, ANTHONY J. RUSSO, RUTH S. SCHILDHOUSE, WAYNE E. SHAFFER, ROBERT W. WALKER, ROBERT E. WILLIAMS, MARTHA WISE, In their capacities as members of the State Board of Education for the State of Ohio and FRANKLIN B. WALTER, as Superintendent of Public Instruction for the State of Ohio.

Recitals

WHEREAS, Plaintiff initiated a certain civil action against State Defendants and other local Defendants on January 18, 1980 as styled above, and

WHEREAS, The parties to this agreement desire to settle the complaint herein by execution of this Settlement Agreement, State Defendants neither affirming nor denying the factual or legal allegations made by Plaintiff in these pleadings,

NOW THEREFORE, In consideration of the mutual promises set forth below, the parties agree as follows:

§1

State Defendants shall issue a Memorandum regarding the placement of handicapped children in the least restrictive environment. Said Memorandum is attached here-

to as Exhibit A. This Memorandum will be distributed to superintendents of all local, city, exempted village, joint vocational and nonpublic schools, state institutions and county boards of mental retardation.

§2

State Defendants will add to their Program Review and Evaluation Procedures for Special Education (PREP), a section entitled "Review Guide For Least Restrictive Environment." Said section is attached hereto as Exhibit B.

§3

State Defendants will add two items to the assurances required of school districts applying for federal funds under Part B of the Education of the Handicapped Act. Said assurances are attached hereto as Exhibit C.

§4

State Defendants will make available to counsel for Plaintiff the tabulated data collected in the Annual Report to Legislature required by Section 3323.02 Revised Code.

§5

Within twelve months from the date of this agreement, State Defendants will sponsor a statewide practitioners' conference on the least restrictive environment requirement. Educators from school districts throughout the state will be invited. Planning for the conference will involve representatives from such groups as the Ohio State University Multi-factored Evaluation Project, the Regional Resource Center Project, and the Dean's Task Force. Counsel for Plaintiff may attend planning meetings for the conference and the conference itself.

§6

State Defendants will give priority to funding of additional units for educational programs serving developmentally handicapped and multihandicapped children in the public schools. (Said programs refer to those defined in Proposed Rules For The Education of Handicapped Children. In the present Standards for Special Education corresponding reference is to the programs for educable mentally retarded children and children with severe and/or multiple impairments.)

§7

Nothing in this agreement shall preclude State Defendants from modifying their policies and procedures regarding least restrictive environment to reflect changing state or federal law or regulation, controlling judicial decisions, or interpretations by the Office of Special Education, United States Department of Education. Furthermore, actions to improve the efficiency and utility of PREP or data collection by State Defendants are not prohibited by this agreement. Notification of any such modification will be conveyed in writing to counsel for Plaintiff herein.

§8

Plaintiff shall dismiss with prejudice all claims of any kind or nature which Plaintiff has or may have claimed in this case against State Defendants based upon any and all matters up to and including the execution date of this agreement. This agreement shall not take effect until Plaintiff has filed said dismissal with the court.

§9

Plaintiff and her attorneys hereby agree to waive any claim or right to attorney fees pursuant to 42 U.S.C. §1988 or any other method of recovery of such fees.

§10

State Defendants hereby agree to pay to counsel for Plaintiff, nine hundred dollars ($900.00) as partial compensation for the costs of this action.

The parties, through respective counsel, hereby execute this Settlement Agreement on the day, month and year first set forth above.

/s/ BARRY COHEN
Barry Cohen, Esq.

and

/s/ CLEMENT PYLES
Clement Pyles, Esq.
Counsel for Mary Ann Roncker on behalf of Neill Roncker

/s/ RICHARD W. ROSS
Richard W. Ross
Assistant Attorney General
Counsel for State Departments

EXHIBIT A

STATE OF OHIO
DEPARTMENT OF EDUCATION
Columbus
43215

FRANKLIN B. WALTER
Superintendent of
Public Instruction

TO: City, County, Exempted Village, Local, JVS, Nonpublic, State Institutions and County Boards of Mental Retardation Superintendents

FROM: Franklin B. Walter, Superintendent of Public Instruction

SUBJECT: Placement of Handicapped Children in the Least Restrictive Environment

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Numerous questions regarding the placement of handicapped children in the least restrictive environment have been raised by school district personnel and by individuals involved in litigation. This memorandum is being issued to assist school districts in identifying the specific federal regulations that govern the placement of handicapped children in the least restrictive environment. Also enclosed is a copy of the Least Restrictive Environment Placement Review Guide that will be used by the Division of Special Education in its onsite review of special education programs as required by federal regulations promulgated for Public Law 94-142.

The following federal regulations must be considered in determining the least restrictive environment of each handicapped child:

I. "(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." [34 Code of Federal Regulations (CFR) 300.550, formerly 45 CFR 121a.550]

II. "(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under 300.13 (formerly 121a.13) of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement." (34 CFR 300.551, formerly 45 CFR 121a.551)

III. "Each public agency shall insure that:

(a) Each handicapped child's educational placement:

(1) Is determined at least annually;

(2) Is based on his or her individualized education program; and

(3) Is as close as possible to the child's home.

(b) The various alternative placements included under 300.551 (formerly 121a.551) are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs." (34 CFR 300.552, formerly 45 CFR 121a.552)

IV. "In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 300.306 (formerly 121a.306) of Subpart C, each public agency shall insure that each handicapped child participates with nonhandicapped children in those services and activities to the maximum extent appropriate to the needs of that child." (34 CFR 300.553, formerly 45 CFR 121a.553)

V. "Each public agency shall take steps to insure that its handicapped children have available to them the variety of educational programs and services available to non-handicapped children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education." (34 CFR 300.305, formerly 45 CFR 121a.305)

VI. "(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available." (34 CFR 300.306, formerly 45 CFR 121a.306)

VII. "(a) General. Physical education services, specially designed, if necessary, must be made available to every handicapped child receiving a free appropriate public education.

(b) Regular physical education. Each handicapped child must be afforded the opportunity to participate in the regular physical education program available to non-handicapped children unless:

(1) The child is enrolled full time in a separate facility, or

(2) The child needs specially designed physical education, as prescribed in the child's individualized education program.

(c) Special physical education. If specially designed physical education is prescribed in a child's individualized education program, the public agency responsible for the education of that child shall provide the services directly, or make arrangements for it to be provided through other public or private programs.

(d) Education in separate facilities. The public agency responsible for the education of a handicapped child who is enrolled in a separate facility shall insure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section." (34 CFR 300.307, formerly 45 CFR 121a.307)

VIII. "Each State educational agency shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to insure that 300.550 (formerly 121a.550) is effectively implemented." (34 CFR 300.554, formerly 45 CFR 121a.554)

While including some of the above requirements, 34 CFR §104.34, issued pursuant to §504 of the Rehabilitation Act of 1973, provides that:

> "(a) Academic setting. A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternative setting to the person's home.
>
> (b) Nonacademic settings. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Reg. 104.37(a)(2), a recipient shall ensure that handicapped persons participate with non-handicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.
>
> (c) Comparable facilities. If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient."

The U. S. Department of Education, in explaining these regulations, has stated, "A separate facility violates §504 unless it is indeed necessary to the provision of an appropriate education to certain handicapped students." 45 Fed. Reg. 30952.

Accordingly, the following factors do not, by themselves, justify the placement of a handicapped child in a separate facility:

(1) The fact that a classroom unit for multihandicapped children may not be available; or

(2) The fact that needed related services may not be currently available through the school district; or

(3) The fact that the child meets the eligibility criteria for programs of the county boards of mental retardation.

In an I.E.P. conference with parents, school districts may propose placement of a handicapped child in a separate educational facility when the assessment team, upon review of the multifactored interdisciplinary evaluation and continuum of alternative placements, determines a separate educational facility to be necessary for the provision of an appropriate education. If such a determination is made, the child's I.E.P. must specify the need(s) which necessitate placement in a separate educational facility. Parents are to be informed of the availability and characteristics of all appropriate alternative placements in the continuum including special education programs for developmentally handicapped and multihandicapped children in the public schools.

When the above conditions have been followed, any placement mutually agreed to by the school district and the parents may be considered appropriate.

Future annual reviews of an I.E.P. and placement decision need to consider the federal regulations outlined above, especially those reviews for children placed in a program operated by a county board of mental retardation.

Provisions of these federal regulations have also been incorporated in the attached "Review Guide for Least Restrictive Environment", which will become a part of PREP.

FBW:js attachs.

EXHIBIT B

REVIEW GUIDE FOR LEAST RESTRICTIVE ENVIRONMENT 34 CFR 300.550 - 300.556 (Formerly 45 CFR 121a.550-121a.556)

COUNTY _____ DISTRICT _____

DATE COMPLETED _____

REVIEWER _____

NAME OF DISTRICT'S REPRESENTATIVE _____

POSITION _____

	Yes	No	Comments
I. Does your district insure that to the maximum extent appropriate, handicapped children, including children in public or private institutions or in other care facilities, are educated with children who are not handicapped? 34 CFR 300.550(b)(1) [Formerly 45 CFR 121a.550(b)(1)]			
Does your district have arrangements or agreements with public and private institutions to assure that no child in an institution who is capable of education in a regular public school setting is denied access to an education in that setting? 34 CFR 300.554 [Formerly 45 CFR 121a.554]			
III. Does your district insure that special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular class with the use of supplementary aids and services cannot be achieved satisfactorily? 34 CFR 300.550(b)(2) [Formerly 45 CFR 121a.550(b)(2)]			

	Yes	No	Comments
IV. Does your district insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services? 34 CFR 300.551(a) [Formerly 45 CFR 121a.551(a)]			
V. Are the following continuum of alternative placements available at or provided by your school district? a) Instruction in regular classes; b) Instruction in special classes; c) Instruction in special schools; d) Home instruction; e) Instruction in hospitals and institutions. . . . . . 34 CFR 300.551(b)(1) [Formerly 45 CFR 121a.551(b)(1)]			
I.. Does your district insure that the continuum of alternative placements make provision for supplementary services to be provided in conjunction with regular class placement, including a) Provision of resource room? b) Provision of itinerant instruction? 34 CFR 300.551(b)(2) [Formerly 45 CFR 121a.551(b)(2)]			
I. Does your district insure that each handicapped child's educational placement a) Is determined at least annually? b) Is based on his/her individualized education program? c) Is as close as possible to the child's home? 34 CFR 300.552(a) [Formerly 45 CFR 121a.552(a)]			
I. Does your district insure that the alternative educational placement options are available to the extent necessary to implement the individualized education program for each handicapped child? 34 CFR 300.552(b) [Formerly 45 CFR 121a.552(b)]			

	Yes	No	Comments
IX. Does your district insure that each child is educated in the school which he or she would attend if not handicapped, unless the child's individualized education program requires some other arrangements? 34 CFR 300.552(c) [Formerly 45 CFR 121a.552(c)]			
X. Does your district insure that placement in the least restrictive environment takes into consideration any potential harmful effect on the child or on the quality of services which he or she needs? 34 CFR 300.552(d) [Formerly 45 CFR 121a.552(d)]			
XI. Does your district insure that each handicapped child participates with nonhandicapped children in the following services and activities to the maximum extent appropriate to the needs of that child?			
a) Meals			
b) Recess periods			
c) Art			
d) Music			
e) Industrial arts			
f) Consumer and homemaking education			
g) Vocational education			
h) Counseling services			
i) Athletics			
j) Transportation			
k) Health services			
l) Recreational activities			
m) Special interest groups or clubs			
n) Employment of students and assistance in making outside employment available			
34 CFR 300.553, and .305, .307 [Formerly 45 CFR 121a.553, and .305, .307]			

	Yes	No	Comments
Does your district insure that each parent or surrogate parent of a handicapped child, or each handicapped child if appropriate, is informed of all placement options for which the child is eligible according to state standards? 34 CFR 300.504 [Formerly 45 CFR 121a.504]			
Does your district insure that no handicapped child is assigned to a separate educational facility unless the child's I.E.P. documents that the child's needs are such that a separate educational facility is necessary to the provision of an appropriate education for the child? 34 CFR 104.34(c) [Formerly 45 CFR 84.34(c)]			

EXHIBIT C

ASSURANCE FOR FLOW-THRU APPLICATION ON LRE

The applicant school district assures:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

ORDER OF THE UNITED STATES DISTRICT COURT DETERMINING SCOPE OF JUDICIAL REVIEW AND DENYING CLASS CERTIFICATION

(Filed March 13, 1981)

Civil No. C-1-80-29

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARY ANN RONCKER, *et al.*,
Plaintiffs,

v.

FRANKLIN B. WALTER, *et al.*,
Defendants.

ORDER DETERMINING SCOPE OF
JUDICIAL REVIEW
AND DENYING CLASS CERTIFICATION

This matter is before the Court pursuant to request that the parties file briefs as to the appropriate scope of judicial review by this Court. Upon consideration of such briefs, it is the Court's determination that in accordance with 20 U.S.C. §1415(e)(2) the plaintiff is entitled to present additional evidence to the Court as well as place into evidence the records of the administrative proceeding. Accordingly, the Court determines that this matter will be heard *de novo* commencing Tuesday, March 17, 1981.

On December 18, 1980 the Court did certify a class action in this matter. A class action and a trial *de novo* on the rights of this plaintiff appear at this time to be inconsistent. The presentation of evidence and the administrative record can only relate to the plaintiff in this action. The Court will be called upon to determine whether, by a preponderance of the evidence, plaintiff is entitled to the relief sought. A determination as to relief for this plaintiff does not bear upon the rights of any other person listed in the intended class.

Accordingly, the Order of this Court of December 18, 1980 is hereby set aside and the motion for class certification is hereby DENIED. This matter will proceed as an action between the individual plaintiff and the defendants herein.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
Chief Judge
United States District Court

ORDER OF THE UNITED STATES DISTRICT COURT CONDITIONALLY CERTIFYING CLASS ACTION

(Filed December 19, 1980)

No. C-1-80-029

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARY ANN RONCKER, on behalf of NEILL RONCKER individually and on behalf of all others similarly situated,
Plaintiff,

v.

FRANKLIN B. WALTER, *et al.*,
Defendants.

ORDER

This matter is before the Court on plaintiff's motion for certification of a class action to be maintained under Rule 23(b)(2), Federal Rules of Civil Procedure. Plaintiff seeks to represent a class defined as "Every handicapped child between the ages of 5 and 21, inclusive, in Ohio, during the pendency of this suit whose most recent school placement decision by the School District Superintendent calls for placement in a program operated by a County Board of Mental Retardation . . ." For reasons stated hereafter, the Court declines to certify a class as broad as the foregoing. The Court will, however, certify a class as hereinafter described.

Neill Roncker is a handicapped child within the meaning of 20 U.S.C. §1401(1) which states in part as follows:

> "The term 'handicapped children' means mentally retarded . . . children or children with specific learning disabilities who by reason thereof require special education and related services . . . ."

During oral argument, counsel for plaintiff advised the Court that Neill Roncker has an I.Q. of under 50, which it is agreed is evidence of mental retardation.

It is not controverted that in accordance with the federal laws on education of the handicapped and Ohio Revised Code Chapter 3323, the plaintiff was examined by defendants or their agents and determined to be sufficiently mentally retarded that he should be placed in a special education program operated by the Hamilton County Board of Mental Retardation. Plaintiff's parents contested this finding and litigated this matter through the administrative procedures provided in Ohio Revised Code Chapter 3323. The matter was ultimately appealed to the State Board of Education and the decision that plaintiff be placed in a program operated by the Hamilton County Board of Mental Retardation was affirmed.

It is apparently the crux of plaintiff's argument that while there are options for the placement of the "educable mentally retarded," such as placement in regular classes with non-handicapped children, placement in classes of handicapped children in a school with non-handicapped

---

1. Counsel for both sides have used the terms "trainable mentally retarded" and "educable mentally retarded" and agree that a distinction between the two is an I.Q. of 50. These terms do not appear anywhere in 20 U.S.C. §1401 *et seq.* entitled "Education of Handicapped." They do appear in "Standards for Special Education" prepared by the Ohio State Board of Education.

children or placement in a school solely for handicapped children, such options do not exist for the "trainable mentally retarded" and this represents a violation of the federal Education of Handicapped statutes referred to above.

It is in the foregoing context that the Court must consider the question of whether or not this matter qualifies as a class action. Rule 23(a) of the Federal Rules of Civil Procedure establishes the following prerequisites:

1. Numerosity of class;
2. Commonality of questions of law or fact;
3. Typicality of the claims of the plaintiff; and
4. The fair and adequate representation of the class by plaintiff and plaintiff's counsel.

It is not possible at this point in the proceeding to determine the numerosity of the class. Plaintiff asserts that the class numbers more than 9,000 (Complaint p. 3). That number, however, refers to the class as proposed by plaintiff which this Court finds to be excessive. It is not correct, and even plaintiff does not so assert, that every handicapped child in Ohio has been dealt with in a fashion incompatible with the Education of the Handicapped Act. As pointed out above, it is apparently plaintiff's contention that the "trainable mentally retarded" alone have been denied the options granted to the "educable mentally retarded." The numerosity of class, therefore, must be limited to the "trainable mentally retarded" and that is a matter upon which counsel have not been able to assist the Court.

The questions of both "typicality" and "commonality" need be considered together, since they likewise bear upon the observations made above. Plaintiff's claim is typical

only of the "trainable mentally retarded" and it is only with such group that he possesses the requisite commonality.

It is clear to the Court that plaintiff's counsel are experienced and capable and will give fair and adequate representation to the class.

Satisfying the prerequisites of Rule 23(a) is not enough. In addition to the foregoing, Rule 23(b) requires a further determination. Plaintiff seeks to maintain a class action under Rule 23(b)(2) which provides:

> The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Neither the pleadings nor the memoranda nor the oral argument of counsel indicates an action or refusal to act based upon plaintiff's proposed class. The requirements of Rule 23(b)(2) are satisfied if a more narrowly defined class is certified.

Based upon the proceedings in this matter to this date, it is apparent that only the action of defendants in limiting the placement options of the "trainable mentally retarded" is in issue and it is to such group that the defendants have acted or refused to act.

Accordingly, plaintiff's motion to certify a class as "every handicapped child between the ages of 5 and 21, inclusive, in Ohio during the pendency of this suit whose most recent school placement decision by the School District Superintendent calls for placement in a program operated by a County Board of Mental Retardation is hereby DENIED.

The Court does hereby CERTIFY a class that may be represented by plaintiff, defined as follows:

> Every trainable mentally retarded child between the ages of 5 and 21, inclusive, in Ohio during the pendency of this suit who has been denied placement in an educational program by a School District Superintendent other than one which is completely separated, both administratively and geographically, from public schools attended by children who are not handicapped.

Rule 23(c)(1) provides in part as follows:

> An order under this subdivision may be conditional and may be altered or amended before the decision on the merits.

Since the Court is unable to determine at this time either the merits of plaintiff's claim or the likelihood that defendants' decisions affect a sufficiently numerous class, the certification hereunder will be conditional only and such certification may be altered or amended before the decision on the merits.

It is so ORDERED.

/s/ CARL B. RUBIN
Chief Judge
United States District Court

JUDGMENT ENTRY OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed February 23, 1983)

No. 81-3494

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARY ANN RONCKER on behalf of NEILL RONCKER, Individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

vs.

FRANKLIN B. WALTER, *et al.*,
Defendants-Appellees.

Before: KENNEDY and CONTIE, *Circuit Judges;* and GORDON, *Senior District Judge.*

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby vacated and the case is remanded for further proceedings consistent with the opinion of this Court.

It is further ordered that Plaintiff-Appellant recover from Defendants-Appellees the costs on appeal, as item-

ized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

STATUTES

20 U.S.C. § 1401

§ 1401. Definitions

As used in this chapter—

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

(2) The term "Commissioner" means the Commissioner of Education.

(3) The term "Advisory Committee" means the National Advisory Committee on Handicapped Children.

(4) The term "construction", except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this chapter; or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in connection with the activities in clauses (A), (B), and (C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands and the Trust Territory of the Pacific islands.

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which—

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semi-professional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Commissioner pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: *Provided, however,* That in the case of an institution

offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Commissioner determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, he shall appoint an advisory committee, composed of persons specially qualified to evaluate training provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine whether particular institutions meet such standards. For the purposes of this paragraph the Commissioner shall publish a list of nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the quality of education or training offered.

(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of handicapped children, or the dissemination of information derived therefrom including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Health, Education, and Welfare.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services which (A)

have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this subchapter or under title I or title VII of the Elementary

and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this subchapter or under such titles.

(21) The term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act.

(22) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.

Pub.L. 91-230, Title VI, § 602, Apr. 13, 1970, 84 Stat. 175; Pub.L. 94-142, § 4(a), Nov. 29, 1975, 89 Stat. 775.

20 U.S.C. § 1412

§ 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) the amendment to the plan submitted by the State required by this section shall be available

to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Commissioner.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected

and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

Pub.L. 91-230, Title VI, § 612, Apr. 13, 1970, 84 Stat. 178; Pub.L. 92-318, Title IV, § 421(b)(1)(C), June 23, 1972, 86 Stat. 341; Pub.L. 93-380, Title VI, §§ 614(b), (f)(1), 615(a), Title VIII, § 843(b), Aug. 21, 1974, 88 Stat. 581, 582, 611; Pub.L. 94-142, §§ 2(a)(4) (c), (d), 5(a), Nov. 29, 1975, 89 Stat. 773, 774, 780.

20 U.S.C. § 1415

§ 1415. Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the chlid;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any

party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413 (a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall

have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

Pub.L. 91-230, Title VI, § 615, as added Pub.L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 788.

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No. 82-1890

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CINCINNATI CITY SCHOOL DISTRICT
BOARD OF EDUCATION, *et al.*,

Petitioners,

—VS.—

MARY ANN RONCKER, On Behalf of NEILL RONCKER,
Individually and On Behalf of All Others
Similarly Situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 82-1890

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

CINCINNATI CITY SCHOOL DISTRICT

BOARD OF EDUCATION, et al.,

Petitioners,

vs.

MARY ANN RONCKER, On Behalf of NEILL RONCKER,

Individually and on Behalf of All Others

Similarly Situated,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit

OPINIONS BELOW

Opinion of the United States Court of Appeals for the Sixth Circuit.

Judgment Entry of United States Court of Appeals for the Sixth Circuit.

Findings of Fact, Opinion and Conclusions of Law of United States District Court, Southern District of Ohio, Western Division.

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These Opinions, Orders and Entries appear in the Appendix to the Petition for a Writ of Certiorari.

Resolution of Ohio State Board of

Education on State Level Review of the Impartial Due Process Hearing for Neill Roncker.

Report of Referee to the Ohio State Board of Education.

Opinion of the Impartial Hearing Officer.

These Resolutions, Reports and Opinions appear in the Appendix to this Brief in Opposition.

STATUTES INVOLVED

The Education For All Handicapped Children Act of 1975, 20 U.S.C. Section 1401, et seq.:

20 U.S.C. Section 1401

20 U.S.C. Section 1412

20 U.S.C. Section 1415

The text of these statutes can be found in the Appendix to the Petition for a Writ of Certiorari, beginning at page A55.

The Rehabilitation Act of 1973, 29 U.S.C. Section 701, et seq.:

29 U.S.C. Section 706

29 U.S.C. Section 794

The text of these statutes can be found in the Appendix to this Brief in Opposition, beginning at page A 38.

SUMMARY OF ARGUMENT

This case does not present any of the circumstances which would justify issuance of a Writ of Certiorari. Despite petitioners claim to the contrary, the Judgment and Opinion below did not conflict with the opinion of this Court in Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley, ____ U.S. ____, 102 S.Ct. 3034 (1982). Where the Court of Appeals in Rowley had affirmed a District Court decision overturning the decision of the state agency, the Sixth Circuit here reversed a District Court because that court had ignored the findings of the state agency. Where the State of New York in Rowley had upheld the programming recommendations of the school district, the school district here disagrees with the explicit findings and policy of the State of Ohio. Where the opinion in Rowley dealt with the meaning of 20 U.S.C. Section 1412(1), the Court of Appeals opinion in this case dealt only with 20 U.S.C. Section 1412(5)(B). Thus this case presents a situation which is quite different from Rowley, both factually and legally.

In addition, the school district has by its own actions cast doubt upon whether there continues to be an actual case or controversy in this matter. Under these circumstances, the Petition for a Writ of Certiorari should be denied.

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION OF THE SUPREME COURT.

Petitioners cite, as their sole reason for requesting the issuance of a Writ of Certiorari in this case, an alleged conflict between the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit in this case and that of the Supreme Court in Board of Education of Hendrick Hudson Central School District v. Rowley, ____ U.S. ____, 102 S.Ct. 3034 (1982). In fact, no such conflict exists.

First of all, Rowley involved a Court of Appeals decision which conflicted with state policy, while this case involves a Court of Appeals decision which conforms to state policy on mainstreaming but which is opposed by a single school district. Secondly, this case primarily involves a section of federal law which was not at issue in Rowley.

Petitioners correctly note that, as stated in Rowley, 102 S.Ct. at 3052, Congress left questions of educational

methodology to the states. They fail, however, to understand the import of that Congressional decision for their case. The role of the State of Ohio in this case is quite different from that of New York in Rowley. There, the recommendation of the school district -- that Amy Rowley be educated in a regular first-grade classroom with an FM hearing aid, tutoring, and speech therapy, but without the services of a sign-language interpreter -- had been upheld by the independent examiner and, on appeal, by the New York Commissioner of Education. 102 S.Ct. at 3039-40. By contrast, in this case, the recommendation of the Cincinnati City School District -- that Neill Roncker attend a school for mentally retarded children only, which would provide him with absolutely no contact with non-handicapped children (Pet., at 3) -- was rejected by both the impartial hearing officer and by the State Board of Education. The hearing officer ordered "that Neill Roncker be placed within the appropriate special education class in the regular elementary school setting." A35. On Appeal, the State Board of Education appointed

a referee, who specifically found that "Neill needs the opportunity to interact with and model non-handicapped peers in activities appropriate to his needs such as lunch, recess periods, and transportation." App. at A25. The referee's report was then approved by the State Board of Education. App. at A3. Thus, this is not a case where the Court of Appeals failed to give due weight to the findings of the state agency. Indeed, it was the failure of the district court to consider those findings which lead to the Sixth Circuit's decision. Pet. at A7-8.

In addition, the State of Ohio has, if anything, strengthened its policy in favor of mainstreaming handicapped children since its review of the impartial due process hearing for Neill Roncker. On July 14, 1981, in implementation of the Settlement Agreement entered into between all state defendants and the plaintiff (Pet., at A29 et seq.), Defendant Franklin B. Walter, the Superintendent of Public Instruction of the State of Ohio, issued a memorandum to all school district superintendents in the

state regarding "Placement of Handicapped Children in the Least Restrictive Environment," in which he stated Ohio policy to be that:

> In an I.E.P. conference with parents, school districts may propose placement of a handicapped child in a separate educational facility when the assessment team, upon review of the multifactored interdisciplinary evaluation and continuum of alternative placements, determines a separate educational facility to be necessary for the provision of an appropriate education. If such a determination is made, the child's I.E.P. must specify the need(s) which necessitate placement in a separate educational facility. (Emphasis added).

Pet., at A40.

Clearly, the Sixth Circuit's Judgment that the District Court determine whether the services required by Neill Roncker can feasibly be provided in a regular school is compatible with Ohio policy that handicapped children be educated in regular schools unless the child's needs necessitate placement in a separate educational facility. Thus it is the school district alone which here opposes the emphasis on mainstreaming found in

the Education for All Handicapped Children Act, 20 U.S.C. Section 1401 et seq., in Ohio policy, Pet. at A40, and in the State Board of Education decision in this case, at A 1-3 . In such a case, the courts are not bound to defer to the placement recommendation of the school district. Springdale School District v. Grace, 693 F.2d 41 (8th Cir. 1982), cert. den. ____ U.S. ____, 51 U.S.L.W. 3823 (May 16, 1983).

Petitioners' claim that the Opinion below conflicts with Rowley also fails to take into account the fact that this case turns on a completely different section of the law than did Rowley. In that case, the parties disagreed over the meaning of 20 U.S.C. Section 1412(1), which assures to each handicapped child the right to a free appropriate public education. By contrast, the Court of Appeals in this case interpreted a separate statutory provision, 20 U.S.C. §1412 (5)(B), which requires that, "to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children

who are not handicapped. . ." The dispute in this case centers around the appropriate educational placement for Neill Roncker; in Rowley, both parties agreed that Amy Rowley should be educated in a regular first-grade classroom. 102 S.Ct. 3039. Thus this case simply presents a different question from that decided in Rowley. Cf. Springdale School District v. Grace, 693 F.2d 41 (8th Cir. 1982), cert. den. ____ U.S. ____, 51 U.S.L.W. 3823 (May 16, 1983).

II. RECENT DEVELOPMENTS CAST DOUBT UPON THE CONTINUED EXISTENCE OF A CASE OR CONTROVERSY.

It is axiomatic that the judicial power of the United States extends only to situations in which an actual case or controversy exists. U.S. CONST. Art. III, Section 2, cl. 1. Moreover, a change in circumstances, even one occurring after the decision of the Court of Appeals, may moot a previously existing case or controversy. Kremens v. Bartley, 431 U.S. 119 (1977).

In the instant case, the petitioners have maintained all along that there are children, Neill Roncker among them,

who cannot be educated appropriately in public school buildings. This position was maintained by petitioners as late as oral argument before the Court of Appeals in May, 1982.

On December 8, 1982, however, the petitioner Cincinnati City School District, over the signature of Assistant Superintendent Willis Holloway, sent a letter to all parents within the district whose children attended programs operated by the Hamilton County Board of Mental Retardation. A49-50.In that letter Dr. Holloway stated that, over the 1983-84 and 1984-85 school years, Cincinnati "would provide programs in public school buildings for all children whose parents request it." Id.

Such action by the Cincinnati City School District would in fact provide the relief that respondent Mary Ann Roncker has been seeking since the inception of this suit. Thus the public commitment by Cincinnati to take this action over the next two school years casts grave doubt on whether there currently exists a case or controversy. In such a case, the Judgment and Opinion of the Court

of Appeals, remanding this case to the District Court for additional findings of fact, is clearly an appropriate one, and the issuance of a Writ of Certiorari at this time would be clearly inappropriate.

CONCLUSION.

Petitioners have requested the issuance of a Writ of Certiorari in this case on the grounds that the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit are in conflict with the opinion of this Court in Board of Education of Hendrick Hudson Central School District v. Rowley, ____ U.S. ____, 102 S.Ct. 3034 (1982). Petitioners ignore, however, the fact that here, unlike the situation in Rowley, it is the school district which finds itself opposed to the educational policy of the State. Petitioners also ignore the fact that the Judgment below turned upon a statutory provision not involved in Rowley. Finally, petitioners themselves, through their written communications with parents of mentally retarded children in Cincinnati, have created doubt as to whether there still exists a case

or controversy between the parties. For these reasons, respondents respectfully urge that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

Respectfully submitted,

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APPENDIX

RESOLUTION ON STATE LEVEL REVIEW OF THE IMPARTIAL DUE PROCESS HEARING FOR NEILL RONCKER

WHEREAS under the provisions of Public Law 94-142, Revised Code Section 3323.05, and State Board of Education Standard 3301-51-16, Cincinnati City School District provided an impartial due process hearing on behalf of Neill Roncker pursuant to the request of his parents, Robert and Mary Ann Roncker; and

WHEREAS the Cincinnati City School District appealed the placement decision of the impartial hearing officer; and

WHEREAS Claudia J. Dillahunty, Esquire, was duly appointed as referee to review the record of the impartial due process hearing, take additional evidence if deemed appropriate pursuant to law, and issue a report and recommendations thereon to the State Board of Education; and

WHEREAS the Referee has reviewed the entire record of the impartial due process hearing and has submitted her report and recommendations to the State Board of Education; and

WHEREAS the Referee's report is incorporated herein by reference and recommends that the State Board of Education issue a final order:

1. Finding that Cincinnati's decision to place Neill Roncker in the trainable mentally retarded program at the Dyer School of the Hamilton County Board of Mental Retardation is an appropriate placement in accordance

with law as long as Neill is provided with the opportunity to interact with nonhandicapped peers in a regular school setting in appropriate activities such as lunch, recess periods, and transportation;

2. Directing the Superintendent of the Cincinnati City School District to revise the May 10, 1979, IEP for Neill to include a description of the extent of Neill's participation in the regular school program and to implement the revised IEP as soon as possible in a manner appropriate to Neill's handicap; and

3. Reversing the finding of the Impartial Hearing Officer McConn that Neill's special education class must be provided in a regular elementary school setting;

and

WHEREAS copies of the Referee's report and recommendations were mailed to the parties; and

WHEREAS attorneys for both parties submitted objections to the report; and

WHEREAS the State Board has duly considered the objections and finds that the objections are not well taken: Therefore, be it

RESOLVED, That the recommendations of Referee Claudia J. Dillahunty are approved; and, be it

FURTHER RESOLVED, That the Superintendent of Public Instruction be directed to notify the parties and counsel of this final order.

It was moved by Mr. Meckstroth and seconded by Mr. Blake that the foregoing Resolution be approved. The President called for a voice vote on the motion. Motion carried. (The following Board members indicated a "nay" vote: Rev. Garrett, Mr. Grosser, Mrs. Jacobs, Mr. Lavin, Mrs. Oliver, Mr. Russo, and Mrs. Schildhouse.)

I certify that the foregoing is a true and correct copy of the action taken by the State Board of Education at its meeting on November 12, 1979.

Columbus, Ohio
November 13, 1979

Franklin B. Walter,
Secretary

BEFORE THE OHIO STATE BOARD OF EDUCATION

In the Matter of the Educational Placement of Neill Roncker

REPORT OF REFEREE

October 23, 1979

1. Nature of Proceeding

This review arises out of an appeal by the Cincinnati City School District Board of Education under the provisions of Section 3323.05, O.R.C., and State Board Standard 3301-51-16(D)(5). Cincinnati appeals from the decision of Impartial Hearing Officer (IHO) Philip K. McConn concerning the appropriate educational placement of Neill Roncker, son of Mr. and Mrs. Robert Roncker. IHO McConn's decision was issued August 9, 1979, following an open, impartial due process hearing held on July 26, 1979.

IHO McConn ruled that Neill "... be placed within the appropriate special education class in the regular elementary school setting." (IHO Report, page 3). In so ruling, the IHO stated:

> I feel that the Cincinnati Board of Education has failed to meet the burden of proof, which requires them to show that Neill Roncker has been placed to the maximum extent appropriate with non-handicapped children in his educational placement. As previously stated, there is doubt in my mind of Neill's ability to attend the regular first grade setting, however, this hearing officer feels that he has to follow Federal law and State Law in deciding this matter, and since the present law requires that Neill Roncker be placed to the maximum extent appropriate for his education with non-handicapped children, the Board of Education has not met the burden of proof that its placement in the 169-TMR program complies with the law. (IHO Report, pg. 3)

Cincinnati filed a timely appeal on August 28, 1979, for a review of the IHO decision by the State Board of Education. Also, Cincinnati requested the opportunity to present an additional witness. The parents, through counsel, asked the State Board to consider as part of the appeal the manner in which Cincinnati has implemented the IHO's decision. Subsequently, the State Board appointed the Referee herein to "review the record of said matter, take additional evidence if deemed appropriate, pursuant

to law, and issue a report and recommendation thereon to the State Board of Education." (See State Board minutes of April 11, 1977, Item 13, and letter of Superintendent Walter to Referee dated September 10, 1979.)

Under the authority of State Standard 3301-51-16 and federal regulation 45 C.F.R. §121a.510(b)(3), the Referee granted Cincinnati's request to present the testimony of Mrs. Margaret Rost, Superintendent of the Hamilton County 169 Board Education Program. Mrs. Rost participated in Neill's placement decision and was scheduled to testify at the IHO hearing but was unable to do so because of an emergency. Her testimony was presented to the Referee at a hearing on October 16, 1979, in Columbus.

The record on appeal consists of materials from the hearings held July 26 and October 16, 1979. The materials from the July 26 hearing include (1) magnetic tapes of the hearing, 1 through 6; (2) documentary evidence consisting of Joint Exhibit A, School Board Exhibits 1 through 12, and Parent Exhibits 1a through 1u and 2 through 4; and (3) the decision of the IHO. The record from

the October 16 hearing includes one magnetic tape. The matter was submitted to the Referee by written briefs by counsel for Cincinnati and for the parents.

2. Scope of Review

The ultimate responsibility of the State Board of Education in this appeal is to issue a final order regarding the educational placement of Neill Roncker, based upon an impartial review of the procedures undertaken by, and the evidence submitted to, the IHO. (Section 3323.05 (F), O.R.C.; Standard 3301-51-16(D)(5))

The findings of fact and conclusions of law contained herein constitute the independent decision of the Referee, arrived at upon completion of her review of all the evidence and consideration of the applicable law. (20 U.S.C. §1415(c))

3. The Issues

Generally, the primary issue presented in this appeal concerns the appropriate special education placement for Neill Roncker. Specifically, the issue is whether the Cincinnati Superintendent's decision to place Neill in the Dyer School of the Hamilton County 169 Program for the 1979-80 school year was the least

restrictive alternative and otherwise in accordance with law. The least restrictive provision of law requires that Neill be educated with non-handicapped children to the maximum extent appropriate. The superintendent has the burden of proof as to the adequacy and appropriateness of the educational placement. (Standard 3301-51-16(D)(4)(d)(vi))

An additional issue concerns how the school district has implemented the IHO's decision that Neill be placed in an appropriate special education class in a regular public elementary school.

Neither party has raised any issue concerning the procedures of the IHO hearing. Therefore, the Referee will consider only the issues mentioned above.

4. Summary of Evidence

a. The Child and his Preschool Education

Neill Roncker is a six year old handicapped child who resides in the Cincinnati City school district. Neill has been evaluated several times by the Cincinnati Center for Developmental Disorders (hereinafter "Cincinnati Center"). Neill was evaluated in 1975 when he was

2 1/2 years old and was diagnosed as having a seizure disorder; functioning in the moderately retarded range intellectually and mildly retarded range adaptively; and having markedly delayed expressive language. (Board Exhibit 8, hereinafter "Bd. ___") He was evaluated in 1977 when he was 4 years old. With the seizure disorder he was diagnosed as functioning in the high moderately retarded range intellectually and adaptively with language functioning at 14 to 16 months. (Bd. 7) In both evaluations, the Cincinnati Center recommended that Neill attend preschool and receive language therapy.

Neill attended preschool classes at the Arlitt Child Development Center (hereinafter "Arlitt") of the University of Cincinnati from 1976 to 1979. At Arlitt, Neill was the subject of a case study on a handicapped child who is mainstreamed with nonhandicapped children. (Parent Exhibit 2, hereinafter "Pt. ___")

Dr. Rosalind Williams, a witness for the parents, was Special Services Coordinator at Arlitt when Neill attended preschool. She testified there were

15 preschoolers in Neill's classes. In his last year at Arlitt, there was one other handicapped child in the class. In addition to the teacher, there were two aides. One aide was assigned specifically to work with Neill. (Pt. 2)

Both Dr. Williams and Ms. Gwen Agna, Neill's teacher at Arlitt for two years, testified as to Neill's program, goals and progress at Arlitt. His program included typical nursery school activities such as books, puzzles, art, music, free play, and lunch. The major goals for Neill were language development and independence in self-help and social skills. Dr. Williams and Ms. Agna tesified Neill had made some progress in language development and great progress in independence and social skills.

Dr. Williams testified when Neill was first enrolled at Arlitt, he would isolate himself; he would not explore the room; and he would not interact with the other children. He began to progress but regressed when he was ill with meningitis during the first year. He originally needed constant adult supervision but had become more independent

by the end of the third year. She believed the teacher reinforcement and examples set by other children affected his independence. Neill progressed to where he observes other children, likes being with them, and imitates them.

Dr. Williams also believed Neill's language development had been affected by the nonhandicapped children as well as the teacher. He began to realize what communication was and tried to respond to others by gestures or words. Dr. Williams believed the contact with nonhandicapped children had been a learning tool for Neill and he benefitted from such contact.

Ms. Agna collaborated (sic) Neill's progress at Arlitt and testified she had seen him progress from a dependent isolated child to one who could function independently and would seek out other children. Neill interacted with the other handicapped child as well as the nonhandicapped children. In social skills, he would participate in group activities for up to thirty minutes and not disrupt them and would play next to and with other children.

As to his self-help development, Neill at first was unable to function independently at lunch. In his last year at Arlitt, he functioned independently at lunch by using a fork and spoon, not interfering with other children, scraping his plate clean, and placing his plate on the proper shelf.

While at Arlitt, Neill progressed in his understanding of words spoken to him but made small progress in expressing more than one word utterances. In his progress, Ms. Agna believed Neill benefitted from contact with nonhandicapped children as he observed and responded to them and abided by the limits they set in the classroom.

Two expert witnesses for the parents at the IHO hearing were Dr. Michael Guralnick, Director of the Nisonger Center for Mental Retardation at Ohio State University, and Dr. Nancy Klein, a fulltime faculty member in special education at Cleveland State University. Both witnesses had been involved in experimental educational programs wherein handicapped children had the opportunity to interact with nonhandicapped children.

Both had reviewed Neill's records from Arlitt and evaluations by the Cincinnati Center and believed Neill needed special education programming with emphasis on language therapy and development of self-help and social skills.

Dr. Guralnick testified that Neill could benefit from interaction with nonhandicapped children, particularly in lunch, gym, and free play, as Neill has the characteristics of a child who should be mainstreamed. These characteristics include observational skills and imitating others and interpersonal skills such as outwardness; liking to be with and seeking approval from other children; and engaging in play beside other children.

Dr. Klein testified she believed Neill could benefit from contact with nonhandicapped children in development of his language and social skills. She believed he could benefit from such interaction in lunch, recess, and art and music classes. Both experts felt that Neill's needs could be met in a special education class in a regular public school. Both testified that Neill's development would be delayed

if he were denied interaction with non-handicapped children in his educational program.

b. Current Evaluation of Neill

As Neill approached school age, he was again evaluated by the Cincinnati Center in 1979 for assistance in determining his appropriate educational program. The Cincinnati Center functioned as a multidisciplinary evaluation team and the results of their findings are reflected in Board Exhibits 1, 2, 3, 6, 9, and 10. At almost 6 years of age, Neill was diagnosed as functioning in the severely retarded range intellectually and in the profoundly retarded range adaptively. (Bd. 6) His estimated ability to understand language was indicated at no more than 24 months and his ability to express language was no more than 16 months. (Id.) The evaluation team determined Neill would probably function in the trainable mentally retarded range and recommended he receive special education by attending 169 Board pre-school classes with occupational and speech therapy. (Id.)

In the educational evaluation by

the Cincinnati Center, the educator reported the following general impression of Neill:

> Neill gives the impression of being a toddler who is beginning to assert himself except for gross motor functioning, which is at the 3 year level. He has made very little progress in the past two years. Fine motor functioning is in the 24-29 month range; language and cognition are at the two year level. (Emphasis added.) (Bd. 10, page 2)

The speech evaluation of Neill in 1979 was conducted by Dr. Robert Lupella, who testified at the IHO hearing. He was familiar with Neill's communication problems with both receptive and expressive language. From previous evaluations, he had seen improvement in Neill's language growth but relatively less growth in expressive language. (Bd. 3) He testified he believed Neill's progress was due to maturation and the influence of the environment at home and at Arlitt. He had observed Neill at Arlitt in his language therapy class and preschool class. In his report and testimony, Dr. Lupella expressed concern that Neill

had been in an educational program for several years and had received speech and language therapy and both had not produced significant results in his ability to communicate. (Bd. 3)

Dr. Lupella recommended that Neill be placed in a structured program and believed the TMR-169 program could provide the structured classes which Neill needs. In his testimony, he stressed the importance of continued language therapy which he felt Neill could use on a daily basis. Dr. Lupella believed Neill's language development might be helped by being around nonhandicapped children but believed the development would not be impaired by being in a class with handicapped children.

The current psychological evaluation was conducted by Psychologist Carolyn Davies of the Cincinnati Center who also testified at the hearing. Ms. Davies reported that Neill's measured mental age was two years and his adaptive social behavior was below his mental age. (Bd. 1) Neill could feed himself but was not toilet trained and had no dressing skills. (Id.)

In her report and in testimony, Ms. Davies expressed concern that Neill's mental and adaptive development were decreasing as he grew older. In the previous testing of Neill at the Cincinnati Center, she had seen his measured mental ability change from the low, normal range, then to the moderately retarded range, and presently to the severely retarded range. She believes Neill is functioning in the trainable mentally retarded range at present.

Ms. Davies recommended a change in school placement as she believed that level of instruction at Arlitt was above Neill mentally even if it had been good for him socially and emotionally. She recommended that Neill be in an academic program at his present level of readiness. She testified she would prefer that such program also provide interaction with nonhandicapped children.

c. Placement Recommendation by Cincinnati

The evaluations and recommendation of the team at the Cincinnati Center were considered by the Cincinnati school placement team in May 1979. The placement

team members were Mr. Charles Miller, Director of Psychological Services; Dr. Beverly Veatch, also with Psychological Services; and Mrs. Bernadine Kessinger and Mrs. Margaret Rost of the Hamilton County Board of Mental Retardation (hereinafter "county board"). (Bd. 11)

The placement team unanimously recommended that Neill be placed for special education in the 169 classes for the trainable mentally retarded of the county board. In so recommending, the placement team considered input from Neill's parents and Ms. Agna. Ms. Agna did not protest the 169 recommendation but expressed concern about the lack of opportunity for interaction with nonhandicapped children in the 169 program.

The parents did not agree with the team's recommended placement for Neill so they did not sign the individualized education program (IEP) for him which was developed at a May 10, 1979 conference. (Bd. 12) They did agree as to Neill's needs for special education and the related services outlined in the IEP which include speech and language therapy, occupational therapy, physical therapy, transportation, and counseling. (Id.)

There is nothing indicated in the item identified as "Extent of Participation in Regular Educational Program" in the IEP. (Bd. 12) However, this must be read as "zero" since there was no recommendation that Neill attend regular school for academic or nonacademic activities.

Mr. Charles Miller was chairman of the placement team and a witness for Cincinnati at the IHO hearing. He testified that after considering the Cincinnati Center evaluations and the input by the parents and the Arlitt teacher, the team decided the TMR-169 program was the most appropriate placement for Neill. The team did not consider alternative placements as the evidence clearly indicated that Neill's particular needs could be met by the program and services of the county board. Mr. Miller was familiar with Cincinnati's school programs and he testified to his opinion that Neill's needs could not be met in a regular public school setting for art, music, lunch, or recess. He did not personally evaluate Neill or observe him in the program at Arlitt.

Mrs. Bernadine Kessinger is Director of Services to Children at the county board and she testified at the hearing on behalf of Cincinnati. she indicated

the TMR-169 program is under the supervision of the State Department of Education and the State Department of Mental Health and Mental Retardation and is chartered by both agencies.

Mrs. Kessinger participated in the placement decision and felt the TMR-169 program was the least restrictive and most appropriate program for Neill. She testified that all the students in the TMR program are handicapped and the program uses a curriculum for the moderately retarded. The primary program focuses on such areas as self-help skills, behavior skills, and communication skills. Programs are individualized to each child. The learning process permeates the program and lunch, recess, art and music are part of the curriculum and are taught by people trained in special education. There are generally 12 students to a class but the children may be in larger groups for assemblies or be grouped by ability for certain activities.

Mrs. Kessinger stated the comprehensive program at Dyer School allowed the handicapped children to engage in extracurricular activities such as basketball and cheerleading.

She believed it would be difficult to duplicate the consolidated TMR program offered at Dyer if it were housed in scattered classrooms in different public schools.

Mrs. Margaret Rost, Superintendent of the County Board's Program for Retarded Children, testified at the October 16, 1979 hearing. She also believed the consolidated TMR program was more beneficial to handicapped children than scattered programs in various public schools. She had been an administrator with the county board program since 1960 and had seen the change from a TMR program scattered in different public school sites to a consolidated program.

Mrs. Rost participated in Neill's placement recommendation and believed the county board TMR program would be appropriate for his educational needs. She stated there are no nonhandicapped students at Dyer but there are some nonhandicapped secondary students who volunteer to help with the classes.

The relationship of the county board TMR program to Cincinnati schools was discussed at the IHO hearing by Dr.

Willis Holloway, Assistant Superintendent at Cincinnati, and Mr. Harold Powell, Director of Special Education Programs for Cincinnati. Dr. Holloway described the TMR-169 program as Cincinnati's program for the severely retarded and as an extension of the services which Cincinnati has available to handicapped students. (Pt. 4 at page 10) Mr. Powell described the TMR-169 program as one in a continuum of services which are available to handicapped students. He stated that a child placed in the TMR program is reevaluated periodically and may be changed to another program when appropriate and after parent consultation.

In Cincinnati's application for special education funds for Fiscal Year 1979, the TMR-169 class is listed as a self-contained special class in a special public day school. (Pt. 3 at page A-17) Cincinnati received funding for its TMR program whereby 428 children were served by the county board and 41 children received home instruction. (Id.)

5. Requirements of Law

Both state and federal law require that a free, appropriate education be available to each handicapped child. Further, each handicapped child must be educated to the maximum extent appropriate with children who are not handicapped. (Section 3323.04, O.R.C.) The requirement is explained in state regulation as:

> That is, to the maximum extent appropriate, the handicapped child is educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes, with the use of supplementary aids and services, cannot be achieved satisfactorily. (Standard 3301-51-18(A)(8)(a))

Also, federal regulation states this requirement applies to nonacademic activities:

> In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and ... each public agency shall insure that each handicapped child participates with nonhandicapped children in those services and activities to the maximum extent

appropriate to the needs of that child. (45 C.F.R. §121a.553)

The comment section to the above federal regulations states:

This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. (45 C.F.R. §121a.553)

6. Finding of Fact

The Referee hereby makes the following findings of fact:

a. Neill Roncker suffers from a seizure disorder and is a severely mentally retarded child. Educationally, he functions at the trainable mentally retarded level.

b. Neill attended Arlitt preschool classes for three years where most of his classmates were nonhandicapped and the classes were taught by a teacher and two aides.

c. At Arlitt, Neill progressed in social and self-help skills and changed from an isolated, withdrawn child to one who observed, imitated, and played with and beside the other children. In communication skills, his receptive language increased but he made very little

progress in expressive language at Arlitt.

d. In addition to Neill's ability to observe and imitate other children, he likes to be with other children and seeks approval from them.

e. Neill needs a structured special education program with the level of instruction at his present level of ability and with particular emphasis on speech and language therapy. The program should also develop his self-help and social skills.

f. Neill needs the opportunity to interact with and model nonhandicapped peers in activities appropriate to his needs such as lunch, recess periods, and transportation.

g. Cincinnati offers a special education program for its trainable mentally retarded students through the Hamilton County Board of Mental Retardation. All the students in the county board TMR program are handicapped. The county board TMR program is chartered by the State Board of Education and operates under its standards and the standards of the Department of Mental Health and Mental Retardation.

h. The TMR-169 county board program at Dyer School will provide Neill with a structured special education program and related services but placement in such program will not provide him with the opportunity to interact with non-handicapped peers.

7. Conclusions of Law

The Referee reaches the following conclusions of law:

a. Under State Board Standard 3301-51-16, the Superintendent has the burden of showing the appropriateness of the educational placement of a handicapped child. In the opinion of the Referee, Cincinnati has not entirely met this burden in the placement of Neill in a program which offers no opportunity for interaction with nonhandicapped children.

b. Cincinnati has shown that Neill needs the structured special education program and related services which are available in the TMR-169 program and which were listed in his IEP. Thus, Cincinnati has shown that the nature and severity of Neill's handicap warrants his removal from the regular educational environment in order to maximize his

educational experience.

c. Cincinnati has not shown that no participation in the regular school program is appropriate for Neill's educational needs. Neill has the ability to observe and imitate other children and likes to be with them. He will benefit in the development of his social and language skills by exposure to and interaction with nonhandicapped peers. This interaction can be provided in the regular school setting in nonacademic activities such as lunch, recess periods, and transportation. As Neill progresses, he may be able to benefit from placement in regular classes in academic subjects such as music and art.

d. Cincinnati must educate Neill in academic and nonacademic programs in the regular school setting to the maximum extent appropriate to his needs. To do so, Cincinnati may need to provide an aide to enable Neill to participate in regular school activities such as lunch, recess, and transportation. However, in the opinion of the Referee, the law does not require Cincinnati to

recreate or duplicate the comprehensive TMR-169 program in a regular elementary school building. Cincinnati may meet Neill's special education needs through the existing TMR-169 program as long as provisions are made for his interaction with nonhandicapped peers.

e. Neill's individualized education program developed on May 10, 1979 must be revised to describe the extent of Neill's participation in the regular school program as discussed above.

8. Cincinnati's Implementation of the IHO Decision

The parents have requested the Referee to "...recommend that the State Board of Education order the Cincinnati Public Schools to immediately implement the provisions of Neill's Individualized Education Program." (Parents' brief to Referee at page 12) The Referee will briefly discuss their request as she believes it has been covered by the above-listed conclusions of law.

IHO McConn ordered that Neill be placed in an appropriate special education class in a regular elementary school setting. In an effort to comply with

the order during their appeal to the State Board, Cincinnati placed Neill in a special education "transitional" class in a regular public school. (Cincinnati's brief to Referee at page 15) The normal function of the transitional class is to assist Cincinnati in evaluating the nature of a child's handicapping condition. The class is taught by a special education teacher and an aide and a speech therapist works with the class. Cincinnati did not indicate whether Neill is receiving individual speech and language therapy.

The parents contend the transitional program does not provide Neill with an appropriate program as it does not include all the services listed in the IEP developed for Neill. (Bd. 12) The IEP was written in conjunction with Neill's placement in the TMR-169 program. Such placement was rejected by IHO McConn.

The Referee believes the intent of the IHO's order was that Cincinnati duplicate the TMR-169 program in a regular elementary school and provide Neill with the services outlined in his IEP. However, the Referee believes the IHO erred in

finding that Cincinnati must duplicate the TMR program in order to provide Neill with the opportunity to interact with nonhandicapped peers. The requirement of law can be met by placing Neill in the existing TMR program and also providing him with exposure to nonhandicapped peers in appropriate activities in the regular school setting.

Thus, while the Referee believes Cincinnati's placement of Neill in the transitional class was a good faith effort to comply with the IHO's order, the placement does not provide Neill with an appropriate educational program designed to meet his unique needs. As indicated, an appropriate program can be provided by implementing the provisions of Neill's IEP along with providing Neill with appropriate participation in the regular school program.

9. **Recommendations**

Based on her review of the evidence and the above findings of fact and conclusions of law, the Referee recommends the State Board of Education issue a final order:

a. finding that Cincinnati's decision to place Neill Roncker in the trainable

mentally retarded program at the Dyer School of the Hamilton County Board of Mental Retardation is an appropriate placement in accordance with law as long as Neill is provided with the opportunity to interact with nonhandicapped peers in a regular school setting in appropriate activities such as lunch, recess periods, and transportation;

b. directing the Superintendent of the Cincinnati City School District to revise the May 10, 1979 IEP for Neill to include a description of the extent of Neill's participation in the regular school program, and to implement the revised IEP as soon as possible in a manner appropriate to Neill's handicap; and

c. Reversing the finding of Impartial Hearing Officer McConn that Neill's special education class must be provided in a regular elementary school setting.

Respectfully submitted,

Claudia J. Dillahunty
Referee

October 23, 1979

IMPARTIAL HEARING

CINCINNATI BOARD OF EDUCATION

APPEAL OF:	:	
Mr. & Mrs. Robert Joseph Roncker, on behalf of Neill Roncker	:	OPINION OF
-vs-	:	IMPARTIAL HEARING OFFICER
Board of Education Cincinnati City School District	:	

This matter came on for impartial hearing on the 26th day of July, 1979, at the Cincinnati Board of Education Office, Claude V. Courter Education Center, 230 East Ninth Street, Cincinnati, Ohio. Both parties were present; Dr. Holloway, on behalf of the Board of Eduation of Cincinnati City School District, and Mr. & Mrs. Robert Roncker, in person, both represented by counsel.

In reviewing the law, the school district must place Neill Roncker to the maximum extent appropriate with non-handicapped children in his educational placement. Also, according to the standards for Special Education promulgated by

the Ohio Department of Education, in order to carry out the law, the school district bears the burden of proof of showing the placement they have made for Neill's education complies with State and Federal Law.

The Cincinnati School District has placed Neill Roncker in the 169-TMR Program beginning in the fall of 1979, and there has been evidence presented by way of exhibits introduced and testimony from witnesses that the decision made by the Cincinnati School District in the placement of Neill Roncker is for his best interest. There has also been exhibits introduced and testimony of witnesses that the 169-TMR Program is not the proper program for Neill Roncker under both State and Federal Law. Another fact that makes the decision of the hearing officer difficult in this matter, is the fact that Neill will be entering the first grade, and for the first time will be attempting to either begin his education under the 169-TMR program or be assigned to the regularly scheduled first grade classes so that he can associate with other children of his age, and,

of course, have special education structured to this ability while being assigned to the regular first grade. There is doubt in the mind of the impartial hearing officer as to Neill's ability to attend the regular first grade setting, however, I don't believe that the complete answer is available to this question until he is assigned to the first grade and the attempt is made.

It is clear under the law that Neill's placement can be reviewed at least yearly and probably more often if it is so required.

As previously stated, it is very difficult for this impartial hearing officer to adequately determine how Neill will be able to handle assignment to a regular first grade class since he has no history of this type of assignment. Neill has had a history for the past three and one-half years of attending the Arlitt Child Development Program and has made some progress while attending there. However, I realize that this program is of an experimental type and has an adult assigned to a fewer number of pupils than can be expected or can

be hoped for in the regular first grade, with special education.

I feel that the Cincinnati Board of Education has failed to meet the burden of proof, which requires them to show that Neill Roncker has been placed to the maximum extent appropriate with non-handicapped children in his educational placement. As previously stated, there is doubt in my mind of Neill's ability to attend the regular first grade setting, however, this hearing officer feels that he has to follow Federal Law and State Law in deciding this matter, and since the present law requires that Neill Roncker be placed to the maximum extent appropriate for his education with non-handicapped children, the Board of Education has not met the burden of proof that its placement in the 169-TMR program complies with the law. It is the finding of this hearing officer that Neill Roncker be placed within the appropriate special education class in the regular elementary school setting.

Philip K. McConn,
Impartial Hearing
Officer

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within Opinion of Impartial Hearing Officer was mailed by regular mail to Patricia W. Morrison, Assistant City Solicitor, Attorney for the Cincinnati Board of Education, and Barry Cohen, Attorney for Mr. & Mrs. Robert Joseph Roncker, and a copy of the within Opinion of Impartial Hearing Officer was mailed by certified mail, return receipt to James N. Jacobs, Superintendent of Schools, Mr. & Mrs. Robert Joseph Roncker, and to Franklin B. Walter, Superintendent of Public Instruction, this 9th day of August, 1979.

Philip K. McConn

CONSTITUTIONAL PROVISIONS

U.S. CONST., Art. III, Section 2, Clause 1:

> Section 2. The judicial Power shall extend to all cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

§ 706. Definitions

For the purposes of this chapter:

(1) The term "construction" means the construction of new buildings, the acquisition, expansion, remodeling, alteration, and renovation of existing buildings, and initial equipment of such buildings, and the term "cost of construction" includes architects' fees and acquisition of land in connection with construction but does not include the cost of offsite improvements.

(2) The term "criminal act" means any crime, including an act, omission, or possession under the laws of the United States or a State or unit of general local government which poses a substantial threat of personal injury, notwithstanding that by reason of age, insanity, intoxication or otherwise the person engaging in the act, omission, or possession was legally incapable of committing a crime.

(3) The term "designated State units" means (A) any State agency unit required under section 721(a) (2)(A) of this title, or (B) in cases in which no such unit is so

required, the State agency described in section 721(a)(B)(i) of this title.

(4) The term "establishment of a rehabilitation facility" means the acquisition, expansion, remodeling, or alteration of exising buildings necessary to adapt them to rehabilitation facility purposes or to increase their effectiveness for such purposes (subject, however, to such limitations as the Secretary may determine, in accordance with regulations he shall prescribe, in order to prevent impairment of the objectives of, or duplication of, other Federal laws providing Federal assistance in the construction of such facilities), and may include such additional equipment and staffing as the Commissioner considers appropriate.

(5) The term "evaluation of rehabilitation potential" means, as appropriate in each case:

(A) a preliminary diagnostic study to determine that the individual has a substantial handicap to employment, and that vocational rehabilitation services are needed;

(B) a diagnostic study consisting of a comprehensive evaluation of pertinent medical,

psychiatric, psychological, vocational, educational, cultural, social, and environmental factors which bear on the individual's handicap to employment and rehabilitation potential including, to the degree needed, an evaluation of the individual's personality, intelligence level, educational achievements, work experiment opportunities, and other pertinent data helpful in determining the nature and scope of services needed;

(C) an appraisal of the individual's patterns of work behavior and ability to acquire occupational skill, and to develop work attitudes, work habits, work tolerance, and social and behavior patterns suitable for successful job performance, including the utilization of work, simulated or real, to assess and develop the individual's capacities to perform adequately in a work environment;

(D) any other goods or services provided for the purpose of ascertaining the nature of the handicap and

whether it may reasonably be expected that the individual can benefit from vocational rehabilitation services;

(E) referral;

(F) the administration of these evaluation services; and

(G)(i) the provision of vocational rehabilitation services to any individual for a total period not in excess of eighteen months for the purpose of determining whether such individual is a handicapped individual, a handicapped individual for whom a vocational goal is not possible or feasible (as determined in accordance with section 702(c) of this title), or neither such individual; and (ii) an assessment, at least once in every ninety day period during which such services are provided, of the results of the provision of such services to an individual to ascertain whether any of the determinations described in subclause (i) may be made.

(6) The term "Federal share" means 80 per centum, except that it shall mean 90 per centum for the purposes of part C of subchapter I of this chapter and as specifically set forth in section 771(b)(3) of this title: Provided, That with respect to payments pursuant to part B of

subchapter I of this chapter to any State which are used to meet the costs of construction of those rehabilitation facilities identified in section 923(b)(2) of this title in such State, the Federal share shall be the percentages determined in accordance with the provisions of section 771(b)(3) of this title applicable with respect to that State and that, for the purpose of determining the non-Federal share with respect to any State, expenditures by a political subdivision thereof or by a local agency shall, subject to such limitations and conditions as the Secretary shall by regulation prescribe, be regarded as expenditures by such State.

(7)(A) Except as otherwise provided in subparagraph (B), the term "handicapped individual" means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.

(B) Subject to the second sentence of this subparagraph, the term "handicapped individual"

means, for purposes of subchapters IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

(8) The term "local agency" means an agency of a unit of general local government or of an Indian tribal organization (or combination of such units or organizations) which has an agreement with the State agency designated pursuant to section 721(a)(1) of this title to conduct a vocational rehabilitation program under the supervision of such State agency in accordance with the State plan approved under section 721 of this title. Nothing in the preceding sentence of this paragraph or in section 721 of this title shall be construed to prevent the local

agency from utilizing another local public or nonprofit agency to provide vocational rehabilitation services: Provided, That such an arrangement is made part of the agreement specified in this paragraph.

(9) The term "nonprofit", when used with respect to a rehabilitation facility, means a rehabilitation facility owned and operated by a corporation or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual and the income of which is exempt from taxation under section 501(c)(3) of Title 26.

(10) The term "public safety officer" means a person servicing the United States or a State or unit of general local government, with or without compensation, in any activity pertaining to—

(A) the enforcement of the criminal laws, including highway patrol, or the maintenance of civil peace by the National Guard or the Armed Forces,

(B) a correctional program, facility, or institution where the activity is potentially dangerous because of contact with criminal suspects, defendants, prisoners,

probationers, or parolees,

(C) a court having criminal or juvenile deliquent jurisdiction where the activity is potentially dangerous because of contact with criminal suspects, defendants, prisoners, probationers, or parolees, or

(D) firefighting, fire prevention, or emergency rescue missions.

(11) The term "rehabilitation facility" means a facility which is operated for the primary purpose of providing vocational rehabilitation services to handicapped individuals, and which provides singly or in combination one or more of the following services for handicapped individuals: (A) vocational rehabilitation services which shall include, under one management, medical, psychiatric, psychological, social, and vocational services, (B) testing, fitting, or training in the use of prosthetic and orthotic devices, (C) prevocational conditioning or recreational therapy, (D) physical and occupational therapy, (E) speech and hearing therapy, (F) psychiatric, psychological and social services, (G) evaluation of rehabilitation potential, (H) personal and work adjustment, (I) vocational training with a view toward career advancement (in combination with other rehabilitation services),

(J) evaluation or control of specific disabilities, (K) orientation and mobility services to the blind, and (L) extended employment for those handicapped individuals who cannot be readily absorbed in the competitive labor market, except that all medical and related health services must be prescribed by, or under the formal supervision of, persons licensed to prescribe or supervise the provision of such services in the State.

(12) The term "Secretary", except when the context otherwise requires, means the Secretary of Education.

(13) The term "severe handicap" means the disability which requires multiple services over an extended period of time and results from amputation, blindness, cancer, cerebral palsy, cystic fibrosis, deafness, heart disease, hemiplegia, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, neurological disorders (including stroke and epilepsy) paraplegia, quadriplegia and other spinal cord conditions, renal failure, respiratory or pulmonary dysfunction, and any other disability specified by the Secretary in regulations he shall prescribe.

(14) The Term "State" includes the District of Columbia, the Virgin Islands, Puerto Rico, Guam, American Samoa, and the Trust Territory of the Pacific Islands, and for the

purposes of American Samoa and the Trust Territory of the Pacific Islands, the appropriate State agency designated as provided in section 721(A)(1) of this title shall be the Governor of American Samoa or the High Commissioner of the Trust Territory of the Pacific Islands, as the case may be.

(15) The term "vocational rehabilitation services" means those services identified in section 723 of this title which are provided to handicapped individuals under this chapter.

§ 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by an Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to

appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

A49

CINCINNATI PUBLIC SCHOOLS

Claude V. Courter

Education Center

230 East Ninth Street Cincinnati, Ohio 45202

December 8, 1982

Dear Parent:

The Cincinnati City School District has begun its planning for the 1983-84 school year. Part of the planning will provide for additional programs for youngsters presently attending 169 facilities, if parents request it. Therefore, it is important that you, as a parent, decide which placement option you prefer for your child.

In discussion with the Hamilton County Board of Mental Retardation (169), it has become apparent that the best interests of the children could be served by a plan, completed over a two year time span, which would provide programs in public school buildings for all children whose parents request it. Therefore, in the 1983-84 school year, the initial emphasis will be on programs for those children aged 5 through 10. The following year the emphasis will be on older children.

Because we will need time to identify appropriate classroom locations, employ staff, meet with parents, and re-evaluate some of the children, it is extremely important that you make your wishes known to us at this time.

Please check your preference, complete the bottom portion of this letter, and return it in the enclosed envelope by December 17.

Sincerely,

Willis Holloway, Ed.D.
Assistant Superintendent
Department of Student Services

_____ I wish my child to be placed in a 169 facility.

_____ I wish my child to be placed in a public school building.

Child's Name _____
Date of Birth _____

Parents Signature _____

Address _____
Telephone _____

Telephone (1-513) 369-4000

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FILED
JUN 9 1983
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No. 82-1890

IN THE

Supreme Court of the United States

October Term, 1982

Cincinnati City School District
Board of Education, et al.,
Petitioners

v.

Mary Ann Roncker,
on behalf of
Neill Roncker, Individually and
on behalf
of all others similarly situated,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

MOTION TO APPEAL AS AMICUS CURIAE, AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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THOMAS A. SHANNON
Executive Director
National School Boards Association

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION OF THE NATIONAL SCHOOL BOARDS ASSOCIATION TO FILE BRIEF AS AMICUS CURIAE

The National School Boards Association (NSBA) moves this Court for leave to participate as amicus curiae herein, for the purpose of filing the attached brief in support of the Petition for Certiorari. Counsel for Petitioners has consented to the appearance. A copy of the letter of consent is attached. Counsel for Respondents has refused to consent.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Each of the 16,000 school districts, governed by locally elected or appointed school boards, receives or is eligible to receive financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq.

At first glance, the decision of the Sixth Circuit Court of Appeals in this case may appear to be merely a dispute between

one local school district and the parents of one handicapped child. It is not. Rather, the decision will have an effect on every school district in this country and NSBA believes that it is important for this Court to have the benefit of the views of the national organization which represents these school districts.

Cases brought under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq., are highly emotional and call upon lower courts to make difficult decisions involving the education of handicapped children. These courts must listen to the pleas of parents to approve particular placements or services while the school districts often find themselves in the uncomfortable but necessary position of arguing against the parents. Understandably, courts become caught up in the emotion of the case and their empathy for the parents of the children may cause them

to hold in the parents' favor regardless of the legal principles involved. For example, the Second Circuit Court of Appeals, in Board of Education of Hendrick Hudson Central School District v. Rowley, 632 F.2d 945 (2d Cir. 1980), even invoked a rule to suppress its decision so that the Court could hold for the parents without setting a precedent.

The Supreme Court's reversal of the decision in Rowley, 102 S.Ct. 3034 (1982), had the result of pulling back lower courts, which if left on their own, would hold in favor of the parents of handicapped children regardless of the law or the educational merits of the decision. The Sixth Circuit case below may well have the effect of carving out an exception to Rowley which lower courts can use in their efforts to hold in favor of parents who want their children placed with non-handicapped children at any cost -- a

terrible educational result.

The membership of NSBA is in the business of making these hard decisions every day and is devoted to the highest standards of educational excellence in assuring a quality education for each handicapped student in the country. In light of these factors, NSBA respectfully urges this Court to allow it to state its views on the Petition for Writ of Certiorari.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record

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THOMAS A. SHANNON
Executive Director
National School Boards Association

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*Citation is to Education for the Handicapped Law Report, published by CRR Publishing Company, Alexandria, Virginia 22313-1905.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Cincinnati City School District
Board of Education, et al.,
Petitioners

v.

Mary Ann Roncker
on behalf of
Neill Roncker, Individually and
on behalf of
all others similarly situated,
Respondents

AMICUS CURIAE BRIEF OF
THE NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than

minety-five percent of this nation's public school children.

Each of the 16,000 school districts, governed by locally elected or appointed school boards, receives or is eligible to receive financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq.

REASONS FOR GRANTING WRIT

1. The court below has ignored the precedent set by the United States Supreme Court in Board of Education of Hendrick Hudson Central School District v. Rowley, 102 S.Ct. 3034 (1982).
2. The effect of the decision below is to prohibit all school districts in the sixth circuit from operating or assigning handicapped students to special day schools. This decision also serves as a precedent for all other circuits to rule in the same manner.

3. There are two major principles and requirements in the Education for All Handicapped Children Act:

   (a) The requirement of a "free appropriate public education" and

   (b) The requirement that to the "maximum extent appropriate" handicapped children be educated with children who are not handicapped -- the concept of "mainstreaming."

The U.S. Supreme Court has defined the first, but school districts across the country still await definitive guidance as to the meaning of the second.

1. The Supreme Court Decision in Rowley

The Supreme Court's decision in Rowley is the landmark decision under the Education for All Handicapped Children Act. This decision has had the effect of curbing to some degree the understandable

zeal of lower courts which before Rowley gave parents what they wanted, regardless of the law or the educational decisions of local educators. See, e.g., Lang v. Braintree School Committee, 545 F. Supp. 1221 (D. Mass. 1982) and Dopico v. Goldschmidt, 687 F.2d 644,653 (2d Cir. 1982).

The standard set in Rowley requires lower courts to determine only: 1) whether all procedural requirements of the Act have been met and 2) whether the individualized educational program (IEP) developed through the Act's procedures is resonably calculated to enable the child to receive educational benefits. The sixth circuit in the case at bar found that all procedural requirements of the Act had been met and, apparently, also found that Neill would benefit from the school district's proposed IEP. However, without referring to the question of whether the regular

school setting is "appropriate" for Neill, the court held in favor of the parents.

The sixth circuit has chosen not to be hampered by the Supreme Court's admonitions in Rowley and instead has elevated the concept of "mainstreaming" to an unprecedented level bearing no relationship to the education of handicapped children. The court distinguishes Rowley on the ground that Rowley involves "educational methodology" while the case at bar involves "mainstreaming." This is an astonishing conclusion given the fact that the single most important educational decision to be made by a school district in developing an individualized education program for a handicapped child is the appropriate placement for that child. That placement decision is not made in a vacuum but must be related to the educational needs of the child.

The Supreme Court stated in Rowley that the term "appropriate" could be interpreted as meaning the "setting" of the education. 102 S.Ct. at 3046. The high court also noted that "despite this preference for 'mainstreaming' handicapped children .... Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children .... The Act thus provides for the education of some handicapped children in separate classes or institutional settings."[11] 102 S.Ct. at 3038.

The lower court is correct in finding that the concept of "mainstreaming" or "least restrictive environment" is indeed an important cornerstone of the Education for All Handicapped Children Act. However, in the statute and its regulations, references to the concept of "mainstreaming" are always modified by the words "to the maximum extent appropriate"

or other references to the "unique needs" of the child. The purpose of these requirements, of course, is to assure that the state and local educational agencies treat each handicapped child as an individual.

Further, the references to the interplay between handicapped and nonhandicapped children are always found in the context of educational services, not in reference to other activities such as recess and lunch.

The debate between Neill Roncker's parents and the school district is similar to that in Rowley. The parents in Rowley were strongly in favor of the use of an interpreter for their child, even though the evidence showed that Amy was not doing as well with an interpreter as she had done previously. Similarily, the parents of Neill Roncker believe that the avoidance of the "stigma" of a special school

overshadows the fact that Neill is not doing well in the regular school. Roncker v. Walter, (6th Cir. 1983) No. 81-3494 slip op. at 11. In both cases the school districts developed the IEP with the individual needs of the child in mind, then developed programs designed to meet those needs. The district court in the instant case "recognizing that placement with non-handicapped children should be a most important objective," still found that Neill could not be appropriately educated in the regular school. Id.

The sixth circuit simply ignores the clear directive of the Supreme Court not to substitute the court's judgement for the educational judgement of the local school district, and further, ignores the "appropriate" education requirement of the Act itself.

2. Effect of the Decision on School Districts Across the Country

A study by the Rand Corporation for the U.S. Department of Education found that of those handicapped students served in public schools, one percent were in regular education classes full time and received indirect services only, 41 percent were in regular education classes and received special related services only, two percent were in regular education class and received itinerant special teaching services, 31 percent were in a regular class a majority of the time and in a special class a minority of the time, 11 percent were in a special class a majority of the time, five percent were in a special class full time, five percent were in a special day school for only handicapped pupils and three percent were homebound. "The Cost of Special Education," November, 1981. The statistics used for the study

were from the 1977-1978 school year.

The U.S. Department of Education's Fourth Annual Report to Congress on the Implementation of P.L. 94-142, which is based on 1979-80 and 1980-81 data, states that less than seven percent of handicapped children are receiving their education outside of regular education buildings. "The number of children identified as handicapped and receiving special education and related services has continued to rise since the passage of P.L. 94-142 .... For the most part, handicapped children are being served in regular education buildings with their non-handicapped peers."

Members of Congress, during debate on the Act, expressed great concern over the fact that four million children at that time were not receiving educational services at all but were either shunted into institutions or were simply not allowed to enroll in the public schools at

all. June 18, 1975 Cong. Rec. S 10959.

As the above statistics show, that situation has changed. Students are today placed in special settings, not to "get rid" of them but in order to provide them with an "appropriate" education. If the decision below is left to stand, it could have a devastating effect on the 5% of children who are most in need of the special services which the Act was passed to provide.

The court below, ignoring the educational decisions made by the school district, takes the "mainstreaming" concept completely out of the context of education and places it in a separate context, requiring the school district to place all handicapped children in the regular school if it is "feasible" to do so. If the school district is forced to ignore the educational appropriateness of the placement there will be only rare instances

where regular school placement is not "feasible." These would be cases of severely physically handicapped children who are hospitalized and cannot be educated in the regular school. All children who are presently educated in special day schools would have to be placed in the regular school.

3. School districts across the country need definitive guidance on the relationship of "mainstreaming" and "free appropriate public education."

On August 4, 1982 the Department of Education published for comment a proposed regulation, 47 Fed. Reg. 33836, under the Education for All Handicapped Children Act. NSBA surveyed its members on the proposal in an effort to get the most data possible on issues of the Act's implementation and interpretation. Representatives from across the country

consulted with NSBA on these issues. The consensus was that there are four areas particularly concerning school districts:

1. How does the concept of "least restrictive environment" or "mainstreaming" relate to the concept of "free appropriate public education"?
2. What is a "related service"?
3. May handicapped students be subjected to discipline?
4. The fourth concern is a mechanical problem relating to the paperwork requirements of the Individual Education Plan.

School districts continue to raise questions as to whether the "mainstreaming" concept stands on its own or relates to "appropriate" placement.

There are several court decisions relating to the placement of handicapped

children for educational purposes. See, e.g., Springdale School District #50 of Washington County v. Grace, 656 F.2d 300 (8th Cir. 1981); Town of Burlington v. Dept. of Ed. of Commonwealth of Mass., 655 F.2d 428 (1st Cir. 1981). Some of these decisions arise out of suits by parents who wish more restrictive placements for their children. See, e.g., Hessler v. State Bd. of Ed. of Maryland, ___ F. Supp. ___ (D. Md. 1981) 3 EHLR 553:262.* None have been found to exist relating to placement for noneducational purposes, such as recess and lunch. All of the state agency decisions which have been found on this point, however, agree that placement decisions should be based on the appropriateness of the educational criteria and not on some concept of "mainstreaming"

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which bears no relationship to the appropriate placement for the purpose of meeting the unique educational needs of the child. The decision at bar, if left standing, would reverse the state educational agency decisions in Pennsylvania (3 EHLR 503:157); Illinois (3 EHLR 503:339); Indiana (3 EHLR 503:309); and California (4 EHLR 504:103).

CONCLUSION

NSBA, on behalf of its membership, urges this Court to grant the writ of certiorari in this case. Unfortunately, in its zeal to render a decision favorable to the parents of one severely handicapped child, the Sixth Circuit has ignored the effect which its decision will have on all other handicapped children whose parents want them enrolled in special day schools.

In setting its unique precedent, the lower Court has also ignored the Supreme Court's directive to lower courts to leave educational decisions to those best qualified to make them.

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